(17,361.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 259.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF THE ESTATE OF CHRIS. SWEETMAN, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 United States Circuit Court of Appeals, Sixth Circuit.

THE CINCINNATI, HAMILTON & DAYTON Railroad Company, Plaintiff in Error, *v.* BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased, Defendant in Error.	No. 661. Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division.

This was an action brought by Benj. F. Thiebaud, a citizen of Indiana, as administrator of Chris. Sweetman, deceased, appointed by the circuit court of Fayette county, Indiana, against the C., H. & D. R. R. Co., a corporation and citizen of Ohio, to recover damages for the wrongful death of said Chris. Sweetman, who, while employed as a locomotive engineer by said company, on an engine drawing its pay car, was, without fault on his part, killed in a collision between his engine and that of a freight train. The collision was caused by the negligence of the conductor and engineer of the freight train. The court charged the jury, among other things, that inasmuch as the deceased had been killed through the negligence of fellow-servants, the defendant would probably not be liable at common law, but that it was liable for the negligence charged and admitted under the act of the General Assembly of Indiana, approved March 4, 1893, entitled "An act regulating the liability of railroad and other corporations, except municipal, for personal injuries to persons employed by them," etc. Laws of Indiana, 1893, p. 294; Rev. Stat. Ind., secs. 7083–7087. Upon which act the plaintiff relied for recovery; to which charge the defendant excepted.

The record does not show upon what ground said exception was taken and does not show that said exception was upon the ground that the statute contravenes the Constitution of the United
2 States, or that the constitutionality of the statute was otherwise raised or considered or decided by the circuit court. The statute is not mentioned in any of the pleadings. The record shows other exceptions taken duly assigned for error, which do not raise any constitutional question, and which may require the reversal of the judgment of the circuit court without reference to any constitutional question.

The jury rendered a verdict in favor of the plaintiff, and judgment was entered thereon.

Thereafter the defendant brought the case, by writ of error, to this court, and assigned for error:

1. That the court erred in charging the jury that the defendant was liable under the act of the General Assembly of Indiana, approved March 4, 1893.

2. That said act is in contravention of the fourteenth amendment of the Constitution of the United States.

3. That said act is in contravention of the constitution of the

State of Indiana and especially of article 11, section 23, of article 4, sections 19 and 23 thereof.

4. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

5. That the court erred in refusing to permit the defendant to put the following question to the witness, Charles M. Cist: "Where were those personal effects at the time you made your application?"

6. That the court erred in ruling out and excluding the testimony offered by the defendant to show that plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

Thereupon the plaintiff in error moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a State is in contravention of the Constitution of the United States, and that, therefore, under section 5 of the act of Congress approved March 3, 1891 (26 Stat., 826), the writ of error should be taken from the Supreme Court of the United States and not from this court.

The court is in doubt whether the case is within the provisions of said section of the act of Congress, and, therefore, upon the foregoing statement of facts it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:

1. Has the circuit court of appeals jurisdiction of a writ of error to the circuit court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

3 2. Has the circuit court of appeals jurisdiction of a writ of error to the circuit court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States which might require a reversal of the judgment without reference to such constitutional question?

3. Does a record showing an instruction by the circuit court directing a jury that the plaintiff is entitled to recover in his action under a State law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the law of a State is in contravention of the Constitution of the United States, within the meaning of section 5 of the act of March 3, 1891, where the record of the circuit court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the circuit court?

4. If it be considered that such record in the circuit court does

not disclose a case in which a law of a State is claimed to be in contravention of the Constitution of the United States, but such claim is made so far as the record shows for the first time in the circuit court of appeals by assignment of error, and is insisted upon at the bar, has the circuit court of appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?

It is further ordered that all proceedings in this case be stayed until the instructions of the Supreme Court on the foregoing questions be certified to this court.

WM. H. TAFT,
HORACE H. LURTON,
C. D. CLARK,
Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting in said Cause.

March 29, '99.

4 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of The Cincinnati, Hamilton & Dayton Railroad Company *vs.* Benjamin F. Thiebaud, administrator of the estate of Chris. Sweetman, deceased, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate was by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 29th day of March, A. D. 1899.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No., 17,361. U. S. C. C. of appeals, 6th circuit. Term No., 259. The Cincinnati, Hamilton and Dayton Railroad Company, plaintiff in error, *vs.* Benjamin F. Thiebaud, administrator of the estate of Chris. Sweetman, deceased. Filed April 10, 1899.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 271.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF CHRIS. SWEETMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 24, 1899.

(17,379.)

(17,379.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 271.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF CHRIS. SWEETMAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1899.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } ss:

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and *had* in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being also the fifth day of that month, in the year of our Lord one thousand eight hundred and ninety-eight, and of the American Independence the one hundred and twenty-second—present, the Honorable Geo. R. Sage, district judge—among the proceedings had were the following, to wit:

BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased. Plaintiff,
vs.
THE CINCINNATI, HAMILTON & DAYTON RAILroad Company, Defendant. } No. 5015. At Law.

Be it remembered that heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-seven, came the plaintiff herein by his attorneys and filed his certain petition and præcipe against the defendant herein, in the clerk's office of the court aforesaid, which said petition and præcipe were clothed in the words and figures following, to wit:

Petition and Præcipe.

United States Circuit Court for the Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased, Plaintiff,
vs.
THE CINCINNATI, HAMILTON & DAYTON RAILroad Company, Defendant. } No. —. Petition.

2 Plaintiff says that on the 20th of February, 1897, he was duly appointed and qualified by the circuit court of Fayette county, State of Indiana, as the administrator of the estate of Chris. Sweetman, deceased, and is a resident and citizen of the State of Indiana.

The defendant is a corporation duly organized under the laws of the State of Ohio, and is a citizen of Ohio, and is now and was in September, 1896, operating a railroad between Cincinnati, Ohio, and Indianapolis, Indiana, and other points.

On the 18th day of September, 1896, plaintiff's decedent, the said Chris. Sweetman, was in the employ of the defendant as an engineer running a locomotive engine of a train operated by defendant on its said railroad, between Indianapolis, Indiana, and Hamilton, Ohio, and while so engaged in the discharge of his duties upon said engine and without fault on his part, but wholly through the negligence of the defendant, its servants, agents and employés, the same was brought into violent collision with another engine belonging to and operated by defendant, near the town of Connersville, Indiana, in which collision the said Chris. Sweetman received injuries from which he died.

The said Chris. Sweetman left surviving him his widow Mary K. Sweetman, and children Clara M. Sweetman and Charles C. Sweetman, for whose benefit plaintiff brings this action, who have been damaged by reason of the death as aforesaid of plaintiff's intestate in the sum of ten thousand dollars for which plaintiff asks judgment and for costs.

CHARLES M. CIST,
EDGAR W. CIST,
Attorneys for Plaintiff.

THE STATE OF OHIO, }
Hamilton County, } *ss:*

Charles M. Cist, being duly sworn, says that he is attorney for Benjamin F. Thiebaud, administrator of the estate of Chris. Sweetman, deceased, plaintiff herein, who is a non-resident of and absent from said Hamilton county, Ohio, and the district aforesaid, and that the facts set forth in the foregoing petition are true as he verily believes.

CHARLES M. CIST.

Sworn to before me and subscribed in my presence this 24th day of February, 1897.

SAM'L S. CHURCH,
[SEAL.] *Notary Public.*

40 cents due S. S. Church.

Præcipe. Issue summons for defendant. Endorse action for money, $10,000 as damages.

3 And afterwards, to wit, on the 25th day of February, A. D. 1897, there was issued out of the clerk's office of the court aforesaid our certain summons directed to the marshal of the said district; which said summons was clothed in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are commanded to summon The Cincinnati, Hamilton & Dayton Railroad Company, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States, for the southern district of Ohio, aforesaid, at Cincinnati, on the fourth Tuesday in the month of March, 1897, to answer unto Benjamin F. Thiebaud, administrator of the estate of Chris. Sweetman, deceased, citizen of and resident of the State of Indiana, in civil action for money as damages.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of February, A. D. 1897, and in the 122nd year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk,*
[SEAL.] By ROB'T C. GEORGI, *Deputy.*

Endorsed: $30.00 deposited security for costs. Action for the recovery of money only. Amount claimed $10,000, for which judgment may be taken, unless it answer on or before the fourth Tuesday in the month of March, 1898.

And afterwards, to wit, on the 10th day of March, A. D. 1897, came the marshal of said district, to whom the aforesaid summons was in form directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 27th day of February, A. D. 1897, and on the 10th day of March, A. D. 1897, I served the same by
4 leaving a true copy thereof with the endorsement thereon at the residence of F. H. Short, treasurer of said company, none of other chief officers being found.

MICHAEL DEVANNEY, *Marshal,*
By JOHN W. DEVANNEY, *Deputy.*

Fees.

Total.... ..... $2.74

And afterwards, to wit, on the 23rd day of March, A. D. 1897, the following answer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased,
vs.
THE CINCINNATI, HAMILTON & DAYTON Railroad Company.
} No. 5015. Answer.

The Cincinnati, Hamilton & Dayton Railway Company, incorrectly sued as the Cincinnati, Hamilton & Dayton Railroad Company, admits that it is a corporation organized under the laws of the State of Ohio, and is a citizen of said State and operates a line of railway between Cincinnati and Indianapolis, and that Chris. Sweetman was in its employ on September 18, 1896. It denies each and every other allegation of the petition.

RAMSEY, MAXWELL & RAMSEY,
Attorneys for Defendant.

STATE OF OHIO, *Hamilton County,* } *ss.*:

C. G. Waldo, being first duly sworn, says that he is general manager of the defendant, and that he believes the allegations of its foregoing answer to be true.

C. G. WALDO.

Sworn to before me and subscribed in my presence this 23rd day of March, 1897.

[SEAL.] THOMAS J. WALSH,
Notary Public, Hamilton County, Ohio.

5 And afterwards, to wit, on the 12th day of November, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry, Journal 4, page 245.

On motion of defendant, it is ordered that this case be passed for trial until Monday, November 15, 1897, at defendant's costs, including the fees of witnesses in attendance until the 15th.

And afterwards, to wit, on the 15th day of November, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry, Journal 4, page 247.

This day came the parties by their attorneys, whereupon to try the issues joined, a jury being called, came, to wit, Barney Borger, J. B.

Compton, Wm. C. Hefferman, R. P. Harkness, Julius C. Hintz, C. H. James, Wm. Lusby, S. B. Markland, John M. Thomas, A. C. Martin, J. T. Weller, and N. P. Runyan, who were duly empaneled and sworn well and truly to try the issues joined and having heard the testimony, the arguments of counsel and the charge of the court, the jury reported the following verdict, to wit:

"We, the jury herein, do find the issues joined in favor of the plaintiff and assess the damages at $10,000.

(Signed) S. B. MARKLAND, *Foreman.*"

And afterwards, to wit, on the 16th day of November, A. D. 1897, the following motion for a new trial was filed in the clerk's office of the court aforesaid, clothed in the words and figures, following, to wit:

Motion for New Trial.

United States Circuit Court, Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased,
vs.
THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY. } No. 5015.

6 Motion for new trial.

Now comes the defendant and moves the court to set aside the verdict herein and for a new trial for the following reasons, to wit:

1. The damages awarded by the jury are excessive.
2. The court erred in rejecting evidence offered by the defendant.
3. The court erred in directing the jury to return a verdict for the plaintiff.
4. The court erred in admitting evidence offered by the plaintiff.
5. The court erred in refusing to direct a verdict for the defendant.

RAMSEY, MAXWELL & RAMSEY,
Attorneys for Defendant.

And afterwards, to wit: on the 28th day of January, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 319.

Entry Extending Time for Presenting Bill of Exceptions.

For good cause shown, the time for presentation and signing of a bill of exceptions in the within cause is extended thirty days.

And afterwards, to wit: on the 26th day of February, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 356.

For good cause shown the time for filing bill of exceptions in the within cause is extended thirty days.

And afterwards, to wit: on the 25th day of March, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 379.

Entry Extending Time for Presenting Bill of Exceptions.

For good cause shown, the time for filing bill of exceptions in the within cause is extended for 20 days.

7 And afterwards, to wit: on the 12th day of April, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 399.

Entry Extending Time for Presenting Bill of Exceptions.

For good cause shown, the time for presenting a bill of exceptions in the above case is extended for the period of sixty days herefrom.

And afterwards, to wit: on the 7th day of June, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry, Journal 4, page 451.

Entry Extending Time for Presenting Bill of Exceptions.

For good cause shown, the time for filing bill of exceptions in the within cause is extended for 90 days.

And afterwards, to wit: on the 11th day of July, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 476.

Motion for New Trial Overruled.

This cause came on to be further heard at this term on the motion for a new trial and the same was argued by counsel, on consideration whereof the court doth overrule said motion, to which action of the court, defendant by its counsel excepts.

And afterwards, to wit: on the 11th day of July, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 476.

Judgment Entry.

Motion for new trial herein having been overruled it is now ordered by the court that plaintiff do have and recover upon
8 the verdict heretofore rendered herein from the said defendant the sum of ten thousand dollars with interest thereon from the 16th day of November, 1897, to all of which defendant excepts.

And afterwards, to wit: on the 19th day of July, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry, Journal 4, page 496.

Entry Allowing Bill of Exceptions.

Now comes the defendant and presents its bill of exceptions in the within cause, which is allowed, signed, sealed and ordered to be made a part of the record.

And afterwards, to wit: on the 19th day of July, A. D. 1898, the following bill of exceptions was filed in the clerk's office of the court aforesaid, clothed in the words and figures, following, to wit:

Bill of Exceptions.

Circuit Court of the United States, Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased, *vs.* THE CINCINNATI, HAMILTON & DAYTON RAILROAD Company.	No. 5015.

Bill of exceptions.

Be it remembered that at the trial of the above-entitled action of October term, A. D. 1897, before the undersigned, George R. Sage, judge, and a jury, it appeared from the evidence and admissions of counsel that the plaintiff's intestate, Chris. Sweetman, was killed in a collision with a freight engine on the defendant's railroad in Fayette county, Indiana, between Longwood switch and
9 Saulter's switch on September 18, 1896, under the following circumstances, being at the time, as he had been for many years previously, in the defendant's employ as a locomotive engineer.

Said deceased on said day was running an engine drawing the pay-car of the defendant going eastwardly from Indianapolis, Indiana, to Hamilton, Ohio.

The defendant's freight train No. 95 also going eastwardly between said points was stalled near Longwood switch. The conductor of said freight train thereupon ordered part of the cars placed on said Longwood switch or side track and proceeded with the balance of the train to Saulter's switch or side track, four and a half miles distant east, intending to come back to Longwood switch for the part of the train he left there. From Saulter's switch to Connersville is $\frac{8}{10}$ of a mile and at said last-mentioned point a telegraph operator was stationed. Having placed said freight cars on the switch at Saulter's switch the conductor and engineer of No. 95 started west with the locomotive and crew to get the cars which had been left at Longwood switch and came into said collision with the deceased's locomotive east of Longwood switch. The conductor and engineer of freight train No. 95 had not left and did not leave a flagman or signals at Longwood switch and did not go to Connersville to receive orders before proceedings westwardly to Longwood switch on the main track, and in failing to leave a flagman or place signals at Longwood switch, or in not going to Connersville to receive orders before proceeding westwardly on said main track, were negligent and said negligence was the cause of said accident.

The deceased was guilty of no negligence and had the right to be with his train at the place where and at the time when he was. The railroad was a single track.

The court charged the jury, among other things, that inasmuch as deceased had been killed through the negligence of a fellow-servant, the defendant would probably not be liable at common law, but that it was liable under the act of the General Assembly of Indiana, for the negligence charged and admitted. To which part of the charge the defendant at the time excepted. The act of the General Assembly of Indiana referred to in said charge, upon which plaintiff relied for recovery, is the act approved March the 4th, 1893, chapter 130, entitled:

"An act regulating liability of railroad and other corporations except municipal for personal injuries to persons employed by them fixing the rules of evidence which shall govern in such cases and providing that the decisions or statutes of other States shall not be pleaded or proven as a defense in this State; provided, further, that its provisions shall not apply to any injuries before it shall take effect nor in any manner to any suits or legal proceedings pending at the time it takes effect and declaring an emergency." Laws of Indiana (1893), p. 294; Revised Statutes of Indiana (1894), sec. 7083–7087.

It also appeared in the course of the trial that the deceased at the time of his death was, and prior thereto had been, a resident and citizen of the State of Ohio and that the widow and children mentioned in the petition had remained and were residents and citizens of the State of Ohio.

The defendant moved to dismiss the action for want of jurisdiction, but the court overruled said motion, holding that the court had jurisdiction because, as it was admitted, the administrator was at the commencement of the action, and had continued to be a resident

and citizen of the State of Indiana, to which the defendant at the time excepted.

The plaintiff also offered in evidence letters of administration issued to Benjamin F. Thiebaud duly certified according to the acts of Congress, hereto attached and made a part hereof marked Exhibit A, and also duly certified copy of the proceedings of the court of Fayette county, Indiana, in the matter of the appointment of Benjamin F. Thiebaud, administrator of Chris. Sweetman, hereto attached and made a part hereof and marked Exhibit B.

The defendant also in the course of said trial called as a witness CHARLES M. CIST, who being duly sworn, testified as follows:

Direct examination.

By Mr. RAMSEY, counsel for defendant:

Q. Mr. Cist, you made an application in Indiana for the appointment of an administrator for the deceased?

A. At the request of the widow I did.

Q. You represented to the court in your application that he left an estate of about one hundred dollars in that county to be administered?

A. I did.

Q. Of what did that estate to which you refer, the hundred dollars, consist?

A. Of a gold watch and some other articles of personal property that were left by him in the county at the time of his death, rings and chains, &c.

11 Q. As a matter of fact he had also a claim against the railroad company, had he not?

A. Yes, but I knew that would not found an administration.

Q. Where were the watch and chain and personal effects that you have referred to at the time you made your application?

A. They were there. But I object to this line of question.

The court thereupon said:

I don't see how you can attack that appointment.

Mr. Ramsey said:

I am not attacking that appointment, I simply want to have the case fully presented to the court on the question of jurisdiction. I want to make it appear that the claim that he is now suing for is on behalf of the next of kin and that is the whole estate. I don't know that it is necessary, but I would like to have the record so show, so that the question can be settled once for all as to the jurisdiction of the court.

Mr. Cleveland, of counsel for plaintiff, then said:

I don't think you can make a collateral attack.

The court said: He wants to show that there was no other estate except this claim. I suppose he wants to raise the question that where an administrator is appointed merely for the bringing of suit that the jurisdiction cannot be sustained. You cannot attack that record.

Mr. Ramsey then put the following question to the witness:

Q. Where were those personal effects that you spoke of at the time you made your application?

Counsel for plaintiff objected to this question.

The court then said: I don't think that it is competent because that cannot be used for any other purpose than to attack this record. The record is conclusive on that in this case. You can prove the fact, if it be a fact that there was no other estate than that which is claimed.

Mr. RAMSEY: I don't want to attack the record, but I want to show that there was no other estate.

The COURT: You are asking what there was in Fayette county; that I rule out.

To which ruling of the court counsel for the defendant then and there excepted.

12 In witness whereof, I, George R. Sage, judge of said court, within the time allowed for the taking of a bill of exceptions by the former orders of the court in this case, do now set my hand and seal this 18th day of July, A. D., 1898, to this bill of exceptions presented by the defendant, and do order that the same be allowed and filed as a part of the record in the case.

GEORGE R. SAGE, [SEAL.]
United States District Judge for the Southern District of Ohio, Sitting in and Holding Circuit Court in the Above-entitled Action.

Approved:
L. MAXWELL, JR.
H. CLEVELAND.

EXHIBIT A.

STATE OF INDIANA, } ss:
County of Fayette, }

In the Matter of the Estate of CHRIS. SWEETMAN, Deceased.
Benjamin F. Theibaud, Administrator.

Be it remembered that on the 20th day of February, 1897, letters of administration were issued upon the estate of Chris. Sweetman to Benjamin F. Theibaud in the words and figures following, to wit:

"I, Miles K. Moffett, clerk of the circuit court for the county of Fayette, in the State of Indiana, do hereby certify that administration of the estate of Chris. Sweetman, late of Fayette county, deceased, who died intestate, is granted to Benjamin F. Theibaud and the said Theibaud having qualified and given bond as such administrator, he is duly authorized to take upon himself the administration of such estate according to law.

Witness my hand and the seal of said court, this 20th day of February, 1897.

[SEAL.]

MILES K. MOFFETT,
Clerk Circuit Court, Fayette Co.

STATE OF INDIANA, } ss:
County of Fayette, }

I, Miles K. Moffett, clerk of the circuit court in and for the county and the State aforesaid, do hereby certify that the above and the foregoing is a true, full and complete copy of the letters of administration issued to the above-named, Benjamin F. Theibaud, upon the estate of Chris. Sweetman, on the day and the date above written as the same is now on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office in the city of Connersville, this the 3d day of May, A. D. 1897.

[SEAL.]

MILES K. MOFFETT,
Clerk Fayette Circuit Court, Fay. Co.

13 *Judge's Certificate under Act of Congress.*

STATE OF INDIANA, } ss:
Franklin County, }

I, Ferdinand S. Swift, sole judge of the Fayette circuit court and judge of the 37th judicial circuit of the State of Indiana, do hereby certify that Fayette county, in the State of Indiana, is comprised within and is part of the said 37th judicial circuit of said State, and that the foregoing attestation and certificate of administration are in due form of law, and that the said Miles K. Moffett is, and at the time of making of said certificate and attestation was, the clerk of the said Fayette circuit court of said State, and is, and at said time was, the proper officer to make such attestation and certificate, and that his signature thereto is genuine, and that as such clerk he is the sole custodian of the papers, documents, records and seals pertaining to said court.

Witness my hand and seal of the said court, this eleventh day of May, 1897.

FERDINAND S. SWIFT,
Judge Fayette Circuit Court.

PL'FF'S EXHIBIT "B." K. J. Harris, Nov. 16, '97.

Judge's Certificate as to Clerk's Signature.

STATE OF INDIANA, } ss:
County of Franklin, }

I, Ferdinand S. Swift, sole judge of the Fayette circuit court within and for the county of Fayette, in the State of Indiana, which said county forms a part of the 37" judicial circuit of the said State of Indiana, of which said 37" judicial circuit in said State I am also

sole judge, do hereby certify that Miles K. Moffett, whose signature is annexed to the above certificate, was at the date thereof, to wit, on the 3" day of May, 1897, the duly elected, qualified and acting clerk of the said Fayette circuit court of the county and State aforesaid, and that the official acts and doings of said clerk are entitled to full faith and credit; that he is the proper officer to make such attestations, and that by virtue of his said office he is the legal custodian of the records of the clerk's office of the aforesaid county and State.

Given under my hand — seal this the 3" day of May, 1897.

FERDINAND S. SWIFT,
Judge of the Fayette Circuit Court.

14 STATE OF INDIANA, }
County of Fayette, } ss:

I, Miles K. Moffett, clerk of the Fayette circuit court within and for the county and the State aforesaid, do hereby certify that said court is a court of record, and that the Honorable Ferdinand S. Swift, whose name is subscribed to the foregoing certificate, was at the time of making the same the sole judge of the said court, duly elected, commissioned and qualified as such, and that the signature to said certificate is the genuine signature of the said Ferdinand S. Swift.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Connersville, this the 3" day of May, 1897.

[SEAL.] MILES K. MOFFETT,
Clerk Fayette Circuit Court.

EXHIBIT B.

STATE OF INDIANA, }
County of Fayette, } ss:

In the Matter of the Estate of CHRIS. SWEETMAN, Deceased.
Benjamin F. Thiebaud, Administrator.

Be it remembered that on the 20" day of February, 1897, in vacation of the Fayette circuit court, the following proceedings were had in the said above-entitled matter, to wit:

In the Matter of the Estate of CHRIS. SWEETMAN, Deceased.
Benjamin F. Thiebaud, Administrator.

Be it remembered that on the 20" day of February, 1897, in vacation of the Fayette circuit court, there was filed in the office of the clerk of said court the verified petition of Charles M. Cist, asking the appointment of Benjamin F. Theibaud as administrator of the estate of Chris. Sweetman, in the words and figures following, to wit:

(H. I.)

In which he shows that said decedent departed this life at and in Fayette county, State of Indiana, on the 18" day of September, 1896,

intestate, leaving a personal estate to be administered of the probable value of $100.00; that his widow and next of kin are not residents of said county nor State.

And the clerk examines said petition, and being fully advised in the premises appoints the said Benjamin F. Theibaud as such administrator, which appointment he accepts and now comes and files his bond as such administrator, conditioned upon the honest and faithful discharge of the duties of his trust, in the penal sum of $200.00, with Joseph I. Little and Edwin M. Stone as his sureties thereon, which bond is now approved by the clerk and is in words and figures following, to wit. (H. I.)

And the said Benjamin F. Theibaud being duly sworn by the said clerk for the honest and faithful discharge of the duties of his trust herein letters of administration are issued to him upon said estate, in the words and figures, following, to wit: (H. I.)

And be it further remembered that afterwards, to wit, on the 1" day of March, 1897, the same being the 1" judicial day of the March term, 1897, of the Fayette circuit court in and for the county of Fayette and the State of Indiana begun, held and continued at the court-house in the city of Connersville, commencing on Monday, the 1" day of March, 1897, before the Honorable Ferdinand S. Swift, sole judge of said court, the following further proceedings were had in the said above entitled cause, to wit:

In the Matter of the Estate of CHRIS. SWEETMAN, Deceased.
Benjamin F. Theibaud, Administrator.

At this day the clerk of this court lays before the judge thereof the petition filed, bond taken and approved and letters issued by the said clerk to Benjamin F. Theibaud as administrator of the estate of said decedent, all done in vacation.

And the court examines all of said papers and approves the same in all things and now hereby fully ratifies and confirms the acts of the said clerk in this behalf as the acts of the court now here.

STATE OF INDIANA, } ss:
County of Fayette, }

I, Miles K. Moffett, clerk of the Fayette circuit court in and for the county and the State aforesaid, do hereby certify that the above and the foregoing is a true, full and complete copy of the record entries made in the probate order books of said court, in the said above-entitled matter as the same is now and remains of record in my office of which record by virtue of my office I am the legal custodian.

In testimony whereof I have hereunto set my name and affixed the seal of said court at my office in the city of Connersville this the 11" day of May, 1897.

[SEAL.]

MILES K. MOFFETT,
Clerk of Fayette Circuit Court.

16 STATE OF INDIANA, } ss:
Franklin County, }

I, Ferdinand S. Swift, sole judge of the 37th judicial circuit of the State of Indiana, and of the Fayette circuit court, do hereby certify that the foregoing attestation and certificate of administration and copy of order book of said court are in due form of law and that the said Miles K. Moffitt is and was at the time of making said attestation and certificate the clerk of the said Fayette circuit court of said State, and is and at said time was the proper officer to make such certificate and attestation, that his signature thereto is genuine, and that as such clerk he is the sole custodian of the papers, documents, records and seals pertaining to said office.

Witness my hand this 12 day of May, 1897.

FERDINAND S. SWIFT,
Judge Fayette Circuit Court.

STATE OF INDIANA, } ss:
County of Fayette, }

I, Miles K. Moffett, clerk of the Fayette circuit court, in and for the county and State aforesaid, do hereby certify that said court is a court of record; that Ferdinand S. Swift, whose name is subscribed to the foregoing certificate, was at the time of making the same the sole judge of said court, duly elected, commissioned and qualified as such and that I am well acquainted with the handwriting of such judge, and that his signature to the same is the genuine signature of the said Ferdinand S. Swift.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Connersville, this the 12th day of May, 1897.

[SEAL.] MILES K. MOFFETT,
Clerk Fayette Circuit Court.

17 And afterwards, to wit, on the 30th day of August, A. D. 1898, the following petition for writ of error and assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition for Writ of Error and Assignment of Errors.

United States Circuit Court, Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, Deceased,
vs.
THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY.

Petition for writ of error and assignment of errors.

The defendant prays for a writ of error to the United States circuit court of appeals for the sixth circuit and assigns for error.

1. That the court erred in charging the jury that the defendant

was liable under the act of the General Assembly of Indiana, approved March 4th, 1893, chapter 130.

2. That said act is in contravention of the 14th amendment of the Constitution of the United States.

3. That the said act is in contravention of the constitution of the State of Indiana, and especially of article 11, section 23, of article 4, sections 19 and 23 thereof.

4. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

5. That the court erred in refusing to permit the defendant to put the following question to the witness Charles M. Cist: "Where were those personal effects that you spoke of at the time you made your application?"

6. That the court erred in ruling out and excluding the testimony offered by the defendant to show that the plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

MAXWELL & RAMSEY,
Attorneys for Defendant.

18 And afterwards, to wit, on the 1st day of September, A. D. 1898, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry, Journal 4, page 515.

This cause came on to be heard on the petition for the allowance of a writ of errors filed herein by the defendant, which petition upon consideration of the court is hereby allowed, and the court allows a writ of error to the United States circuit court of appeals for the sixth circuit, upon the filing of a supersedeas bond in the sum of fifteen thousand dollars ($15,000) with good and sufficient security to be approved by the court.

And afterwards, to wit, on the 1st day of September, A. D. 1898, the following supersedeas bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Supersedeas Bond.

[5c. revenue documentary stamp.]
[National Surety Co., N. Y., Aug. 30, 1898.]
[10c. revenue documentary stamp.]
[National Surety Co., N. Y., Aug. 30, 1898.]

Know all men by these presents, that we, the Cincinnati, Hamilton and Dayton Railroad Company, as principal, and the National Surety Company of New York, as sureties, are held and firmly bound unto Benjamin F. Thiebaud, administrator of Chris. Sweetman, deceased, in the full and just sum of fifteen thousand dollars, to be paid to the said Benjamin F. Thiebaud, administrator, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 30 day of August, in the year of our Lord, one thousand, eight hundred and ninety-eight.

Whereas, lately at a term of the circuit court of the United States, for the southern district of Ohio, western division, in a suit depending, in said court, between said administrator and said railroad company, a judgment was rendered against the said railroad company, and the said railroad company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court
19 to reverse the judgment in the aforesaid suit, and a citation directed to the said administrator, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the first day of October next:

Now, the condition of the above obligation is such that if the said The Cincinnati, Hamilton and Dayton Railroad Company shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD CO.,
By LAWRENCE MAXWELL, JR., *Its Attorney.*
NATIONAL SURETY COMPANY, [SEAL.]
By M. F. WILSON, *Res. Vice-president.*

Attest: GAINES W. SHERRILL,
Res. Assistant Secretary.

20 Sealed and delivered in presence of—
BEN. B. NELSON.
EMILY M. LANGERMAN.

[50c. revenue documentary stamp.]
[C., H. & D. R. R. Co., 8, 30, '98.]

Approved by—
GEO. R. SAGE,
U. S. Dist. Judge, S. D. O.

And afterwards, to wit, on the 15th day of April, A. D. 1899, the following petition for writ of error to Supreme Court of the United States and assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition for Writ of Error to the Supreme Court of the United States and Assignment of Errors.

Circuit Court of the United States, Southern District of Ohio, Western Division.

BENJAMIN F. THIEBAUD, Adm'r of Chris. Sweetman, Deceased,
vs.
THE CINCINNATTI, HAMILTON & DAYTON RAILROAD Company.
No. 5015.

Petition for writ of error to the Supreme Court of the United States and assignment of errors.

The defendant shows to the court that, having duly prosecuted the writ of error heretofore allowed by the court to the United States circuit court of appeals for the sixth circuit, the plaintiff in this case, being the defendant in error, filed a motion in said
22 circuit court of appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States instead of to the United States circuit court of appeals, and that said circuit court of appeals was therefore without jurisdiction upon said writ of error.

Said circuit court of appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States circuit court of appeals was properly allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the circuit court of appeals has jurisdiction thereof, now prays for a writ of error to the Supreme Court of the United States, and assigns for error:

1. That this court erred in charging the jury that the de-
23 fendant was liable under the act of the General Assembly of Indiana, approved March 4, 1893, chapter 130.

2. That said act is in contravention of the fourteenth amendment of the Constitution of the United States.

3. That the case made in this court is not within the provisions of said act.

4. That said act is in contravention of the constitution of the State of Indiana, and especially of article II, section 23, and of article 4, sections 19 and 23 thereof.

5. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

6. That the court erred in refusing to permit the defendant to put the following question to the witness C. M. Cist: "Where were those personal effects that you spoke of at the time you made your application?"

7. That the court erred in ruling out and excluding the
24 testimony offered by the defendant to show that the plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

8. That the plaintiff's appointment as administrator was void, and that this court erred in holding that the appointment could not be collater-ly attacked, and in excluding evidence to show that it was void.

9. That the plaintiff, having been appointed administrator in Indiana alone, cannot maintain this action in this court.

MAXWELL & RAMSEY,
Attorneys for Defendant.

25 And afterwards, to wit, on the 15th day of April, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal entry, Journal 5, page 148.

This cause came on to be heard upon the defendant's petition for the allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the circuit court of the United States for the sixth circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States circuit court of appeals, said petition is now granted and a writ of error, as prayed, is allowed to the Supreme Court of the United States.

The bond is fixed at $500.00.

WM. H. TAFT,
Circuit Judge.

April 15, '99.

26 And afterwards, to wit, on the 17th day of April, A. D. 1899, the following error bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Error Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,
vs.
THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY.

Know all men by these presents that we, The Cincinnati, Hamilton and Dayton Railroad Company and Fred'k H. Short, are held

and firmly bound unto Benjamin F. Thiebaud, administra-
27 tor of Chris. Sweetman, deceased, in the sum of five hundred ($500.00) dollars, to be paid to the said Benjamin F. Thiebaud, administrator of Chris. Sweetman, deceased, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 17th day of April, 1899.

Whereas the above-named The Cincinnati, Hamilton & Dayton Railroad Company has filed its petition for writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Cincinnati, Hamilton and Dayton Railroad Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obliga-
28 tion to be void; otherwise to remain in full force and virtue.

THE CINCINNATI, HAMILTON & DAYTON
RAILROAD COMPANY, [SEAL.]
By LAWRENCE MAXWELL, JR., *Attorney.*
FRED'K H. SHORT. [SEAL.]

Sealed and delivered in presence of—

BEN. B. NELSON.
JOSEPH A. SCALLAN.

The above security is approved.

WM. H. TAFT,
Circuit Judge of the United States, S. D. O.

29 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the proceedings had by and before said court and as the same appears of record and on file in the office of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 20th day of April, A. D. 1899.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk,*
By JANIE W. F. COWEN,
Deputy Clerk.

30 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Benjamin F. Thiebaud, administrator of Chris. Sweetman, deceased, and The Cincinnati, Hamilton and Dayton Railroad Company, a corporation, a manifest error hath happened, to the great damage of the said The Cincinnati, Hamilton and Dayton Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the sixteenth day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 17th day of April, 1899, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

31 [Endorsed:] United States circuit court, S. D. O., W. D. No. 5015. Chris. Sweetman's adm'r *vs.* C., H. & D. R. R. Co. Writ of error. Filed April 18th, 1899. B. R. Cowen, clerk.

32 THE UNITED STATES OF AMERICA, *ss:*

To Benjamin F. Thiebaud, administrator of Chris. Sweetman, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the sixteenth day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The Cincinnati, Hamilton and Dayton Railroad Company, a corporation, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. TAFT,
Circuit Judge.

April 18, '99.

33 [Endorsed:] Marshal's civil docket No. 922. United States circuit court, S. D. O., W. D. No. 5015. Chris. Sweetman's adm'r *vs.* C., H. & D. R. R. Co. Citation to defendant in error. Filed Ap'l 19th, 1899. B. R. Cowen, clerk. Filed Apr. 19, 1899, B. R. Cowen, clerk.

Security for costs furnished.

Received this writ at Cincinnati, Ohio, on the 18th day of April, 1899, and on the same day I served the same by handing a true copy hereof, with all the endorsements thereon, personally to Charles M. Cist, attorney for the within-named Benjamin F. Thiebaud, administrator of Chris. Sweetman.

VIVIAN J. FAGIN,
United States Marshal, S. D. O.,
By M. H. SPILLARD, *Deputy.*

Fees.

1 copy	.50
1 service	2.00
Mileage	.06
	$2.56

Endorsed on cover: File No., 17,379. S. Ohio C. C. U. S. Term No., 27[illegible]. The Cincinnati, Hamilton and Dayton Railroad Company, plaintiff in error, *vs.* Benjamin F. Thiebaud, administrator of Chris. Sweetman, deceased. Filed April 24, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 259.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF THE ESTATE OF CHRIS. SWEETMAN, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

We submit that the writ of error was properly taken from the circuit court of appeals, and that the third question should be answered in the negative.

The certificate shows that no question as to the constitutionality of the statute of Indiana was raised or considered or decided in the circuit court. The statute was not mentioned in any pleading. While the court charged the jury

that the defendant was liable under the statute, it does not appear that the question of constitutionality was considered or determined by the court.

In Ansbro *vs.* U. S., 159 U. S., 695, it was held that "an assignment of errors cannot be used to import a constitutional question into a cause, which the record does not show was raised and decided below, so as to give the Supreme Court jurisdiction under the 5th section of the act of March 3, 1891." In that case it was argued in this court that the statute under which the plaintiff in error had been convicted was unconstitutional. Mr. Chief Justice Fuller said:

"Motions to quash, to instruct the jury to find for the defendant, for a new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of the instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision; and it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. Borgmeyer *vs.* Idler, 159 U. S., 408; Carey *vs.* R'y Co., 150 U. S., 170; *In re* Lennon, 150 U. S., 395; Northern Pacific R'y Co. *vs.* Amato, 144 U. S., 465, 472; Sayward *vs.* Denny, 158 U. S., 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

To the same effect are—

Carey *vs.* Houston & Texas Central Railway Co., 150 U. S., 170, 181.

Northern Pacific Railway Co. *vs.* Amato, 144 U. S., 458, 472.

Cornell *vs.* Green, 163 U. S., 75.

If the third question is answered in the negative, the first and second questions become immaterial. If it is necessary to answer them, we submit that they should be answered in the affirmative. It may be that the plaintiff in error by suing out a writ from the circuit court of appeals waives the right to rely upon errors which involve the construction or application of the Constitution of the United States, but that is no impediment to the consideration and determination of the other questions in the case by the court of appeals. The statute was passed for the relief of this court, and it was not intended that the appeal must necessarily be taken to this court in every case in which the construction or application of the Constitution of the United States is involved in the circuit court. If that is the only question in the record, the appeal must, of course, be taken to this court, and it may be taken here in any case in which it is one of the questions, but the defeated party may be content with such revision of the record as the court of appeals is competent to administer.

In Staffords *vs.* King, 90 Fed., 136, the circuit court of appeals for the fourth circuit held that an appeal lies to the court of appeals, unless the constitutional question is the only and decisive question.

In Pullman's Palace Car Co. *vs.* Central Transportation Co., 39 U. S. App., 307; 76 Fed., 401 (court of appeals for the third circuit), Mr. Justice Shiras, delivering the opinion, said:

"Our view is that the party seeking to appeal is not, by the terms and meaning of the statute, put to an election between the remedies of the fifth and sixth sections, but has a right to raise a constitutional question by a resort to the Supreme Court, and to avail itself of the defenses permissible under the sixth section by an appeal to this court."

The fourth question has become immaterial in view of the decision by this court in Tullis *vs.* Lake Erie and Western R. R. Co., 175 U. S., 348, that the statute of Indiana is constitutional.

The motion to dismiss in the circuit court of appeals was made by the defendant in error. The statement in the certificate that the motion was made by the plaintiff in error is a clerical error.

LAWRENCE MAXWELL, JR.,
Counsel for the Plaintiff in Error.

No. [illegible] 259

Motion to advance.

Office Supreme Court U. S.
FILED
APR 10 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

Filed April 10, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,

Plaintiff in Error,

vs.

B. F. THIEBAUD, Administrator of Chris. Sweetman, deceased,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Motion to Advance for Submission on Brief.

Now comes the defendant in error and moves the Court that this cause be advanced on its docket for submission on brief; this cause coming into this Court on certificate from the Circuit Court of Appeals for the Sixth Circuit.

Counsel for Defendant in Error.

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. [redacted] 259.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
Plaintiff in Error,

vs.

BENJAMIN F. THIEBAUD, Administrator of CHRIS SWEETMAN,
Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO THE MOTION TO ADVANCE.

Printed by James Barclay, 108-118 West Canal Street, Cincinnati, Ohio.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. ——

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
Plaintiff in Error,

vs.

BENJAMIN F. THIEBAUD, Administrator of CHRIS SWEETMAN,
Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO THE MOTION TO ADVANCE.

The motion filed by the defendant in error states no ground for advancing the case, as required by rule 26, and none is known to us. We do not propose to submit the case on printed arguments under rule 20, but desire oral argument. In due time we shall ask that the case be heard with the case between the same parties, which was docketed as No. 794, for October Term, 1898, being a writ of error from this court direct to the Circuit Court to revise the judgment involved in the present proceeding.

We respectfully submit that the motion to advance should be denied.

LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

FILED
APR 10 1899
JAMES H. McKENNEY,
Clerk

No. 770. 259

Brief of Cist & Cleveland for D

SUPREME COURT OF THE UNITED STATES

Filed April 10, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
Plaintiff in Error,

versus

B. F. THIEBAUD, Administrator of the Estate of Chris. Sweetman, deceased,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Defendant in Error.

CHARLES M. CIST,
HARLAN CLEVELAND,
Counsel for Defendant in Error.

EDGAR W. CIST,
Of Counsel.

THE COURT INDEX PRESS.

SUPREME COURT OF THE UNITED STATES

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,
Plaintiff in Error,

vs.

B. F. THIEBAUD, Administrator of Chris. Sweetman, deceased,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of Defendant in Error.

This was a suit for wrongful death. Decedent was a locomotive engineer of defendant and was killed in Indiana by the admitted negligence of defendant's servants, the engineer and conductor of another train. Plaintiff relied on the "Employers' Liability Act" of Indiana, and the Court charged that under that act defendant was liable, to which charge defendant excepted. Verdict and judgment for plaintiff. Defendant took the case by writ of error to the Circuit Court of Appeals for the Sixth Circuit, claiming that the action of the Court in charging the jury that defendant was liable under said act of Indiana was error for that said act contravened the Fourteenth Amendment of the Constitution of the United States and was therefore void. This

claim being pressed by defendant, plaintiff moved in the Circuit Court of Appeals to dismiss the case for want of jurisdiction, it being a "case in which it is claimed that a law of a state is in contravention of the Constitution of the United States," and therefore, under Section 5 of the Act of Congress of March 3d, 1891, the writ of error must be taken from the Supreme Court of the United States and not from the Circuit Court of Appeals.

Thereupon said Circuit Court of Appeals, desiring the instruction of this Court thereon, certified four questions arising upon said motion:

I.

The first question certified is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?"

We submit this question should be answered in the negative.

In *Wrightman* v. *Boone Co.*, 88 Fed., 435, which was a case in which it was claimed that a law of Arkansas was in contravention of the Constitution of the United States, the Court say:

"Section 5 of the act of March 3d, 1891, 26 Stat., 828, C. 517, declares that appeals may be taken to the Supreme Court (6) in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Section 6 provides that in cases other than those provided for in Section 5, the Circuit Court of Appeals may exercise appellate jurisdiction, unless otherwise provided for in Section 5, and consequently this Court has no jurisdiction of it. A careful examination of these sections of the act of Congress in *Hastings* v. *Ames*, 68 Fed., 726, and in *Pauley* v. *Crawford Co.*, 84 Fed., 942, led us to the conclusion that if it is claimed that a law of a state is void because it contravenes the Constitution of the United States, a Circuit Court of Appeals has no jurisdiction of the case, though it may involve the consideration of many other questions."

The same conclusion was reached by the Circuit Court of Appeals of the Seventh Circuit in the case of *Indianapolis* v. *Central Trust Co.*, 83 Fed., 529, in which case it was held (syllabus):

"But the further contention in support of said injunction that the statute was an impairment of a contract right to charge a higher rate of fare given plaintiff by the city ordinance under which it constructed its road involves the application of the contract clause of the Federal Constitution, and fixes exclusive jurisdicti n of an appeal in the Supreme Court."

And in the case of *Holt* v. *Manufacturing Co.*, 80 Fed., 1, in which case the Court say, at page 3:

"The question at issue is whether the statutes of the state of Indiana authorizing such taxation are repugnant to the Constitution of the United States. . . . . The statute provides that in such cases appeals or writs of error may be taken directly to the Supreme Court. The case falls within the classification of cases in Section 5 over which this Court has no jurisdiction upon appeal. It is urged that we should entertain the jurisdiction and certify the question of the validity of the laws of Indiana to the Supreme Court. That we can not do. If we have jurisdiction, we may decide the question without certifying it to the Supreme Court. If we have not jurisdiction, we can not acquire it by or assume it for the purpose of the discretionary act of certification. The decisions in *McLish* v. *Roff*, 141 U. S., 661; *Maynard* v. *Hecht*, 151 U. S., 324; *U. S.* v. *Jahn*, 155 U. S., 109; *In re New York & P. R. S. S. Co.*, 155 U. S., 523, 531; *In re Lehigh Min. & Manuf'g Co.*, 156 U. S., 322, 326; *Shields* v. *Coleman*, 157 U. S., 168, 176; *Colvin* v. *City of Jacksonville*, 157 U. S., 368—in which it was held that in cases where the jurisdiction of the lower Court is involved, the party 'must elect whether he will take of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court'—have reference only to cases involving t e jurisdiction of the Court below, which are comprehended within the first subdivision of the fifth section of the act. They have no application to the other subdivisions of the section, which classify the cases in which the Supreme Court has jurisdiction upon appeal or writ of error. In those cases its juri-diction is exclusive. *Horner* v. *U. S.*, 143 U. S., 570, 576; *Carey* v. *Railway Co.*, 150 U. S., 170, 181; *Chappell* v. *U. S.*, 160 U. S., 499, 509; *Scott* v. *Donald*, 165 U. S., 58. The Circuit Courts of Appeals have jurisdiction only in cases other than those provided for in Section 5. This case is therefore one in which the jurisdiction of the Court below and the right to relief depended upon the question whether the laws of the state of Indiana, which sanctioned the taxation in question, were in contravention on the Constitution of the United States, and therefore a case arising under the Constitution or laws of the United States. It was so considered by the Court below, and relief was granted solely upon that ground. We are con-

strained to the conclusion that this Court has no jurisdiction of an appeal from that decree, and that the proper and only remedy of the appellants is by appeal to the Supreme Court of the United States. Appeal dismissed."

Also by the Circuit Court of Appeals for the Fifth Circuit in the case of *Hamilton* v. *Brown*, 53 Fed. 753. The Court say, page 757:

"We notice further, that in the statement of the case, and particularly in the assignment of errors, the case is shown to be one which involves the construction and application of the Constitution of the United States, as well as a case in which a law of the state of Texas is claimed to be in contravention of the Constitution of the United States. In the fifth section of the act of 1891, *supra*, it is provided 'that appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court, in the following cases: . . . (4), In any case that involves the construction or application of the Constitution of the United States; . . . . (6), in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.' The sixth section of the said act gives appellate jurisdiction to the Circuit Court of Appeals to review by appeal or by writ of error, final decision in the District Courts and the existing Circuit Courts only in cases not provided for in the fifth section of the act. On either or both of the grounds mentioned, it would seem to be our duty to dismiss the appeal, and an order to that effect will be entered. Appeal dismissed."

The same view is expressed by the Circuit Court of Appeals for the Fourth Circuit in *Green* v. *Mills*, 69 Fed., 857.

To the same effect are:

Pauley Co. v. *Crawford Co.*, 84 Fed., 942.
Hastings v. *Ames*, 68 Fed., 726.
Barr v. *New Brunswick*, 72 Fed., 689.
Railway Co. v. *Evans*, 58 Fed., 433.
Macon v. *Georgia Packing Co.*, 60 Fed., 781.
Hamilton v. *Brown*, 53 Fed., 757.
U. S. v. *Sutton*, 47 Fed., 129.
Westerly v *Westerly Water-works*, 76 Fed., 467.
Mayor, etc., v. *City of Macon*, 60 Fed., 781.
Davis & Rankin Co. v. *Barber*, 60 Fed., 465.
Ry. Co. v. *Evans*, 58 Fed., 433.

These cases embrace rulings on the question by the Circuit Courts of Appeals of the First, Third, Fourth, Fifth, Seventh and

Eighth Circuits and no case is found in which any different conclusion has been reached.

This Court has repeatedly entertained jurisdiction in such cases.

In *Scott* v. *Donald*, 165 U. S., 258, the Court say:

"As the case is before us as a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, we have jurisdiction of the entire case and of all questions involved in it. *Horner* v. *U. S.*, 570; *Carey* v. *Railway*, 150 U. S., 181; *Chappell* v. *U. S.*, 160 U. S , 499."

It is true that in a number of instances the Circuit Courts of Appeals have taken jurisdiction of cases in which it was claimed that a state law was in contravention of the United States Constitution, some of which cases have come to this Court on proceeding in error, but an examination of these cases will show that no question as to the jurisdiction of the Circuit Court of Appeals was anywhere raised, or that the attention of the Court was called to the fact that the jurisdiction did not exist. The point was overlooked as well by counsel as by the Court, and no question of jurisdiction was presented, much less contested. As was said by this Court in *Cross* v. *Burke*, 146 U. S., p. 87, the Court "does not consider itself bound by a view of its jurisdiction taken in a case where the question of jurisdiction does not appear to have been contested."

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In the case of *Snow* v. *U. S* , 346, the Court say:

"We conclude, therefore, that we have no jurisdiction of these writs of error, and that they must be dismissed for that reason.

"It is urged, however, that this Court took jurisdiction of the writ of error in *Cannon* v. *U. S.*, 116 U. S., 55, and affirmed the judgment under the same Section 3 of the act of 1882. The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the Court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits. The question was overlooked by all the members of the Court. But, as the case was decided at the present term, and the want of jurisdiction in it is clear, we have decided to vacate our judgment and recall the mandate, and dismiss the writ of error for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction by this Court in a case of the kind."

In *Lau ow Bew* v. *United States*, 144 U. S., 56, the Court say:

"Under Section 5, appeals or writs of error may be taken from the Circuit Courts directly to this Court in six specified classes of cases, namely:

"(1), In any case in which the jurisdiction of the Court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision. (2), From the final sentences and decrees in prize causes. (3), In cases of conviction of a capital or otherwise infamous crime. (4), In any case that involves the construction or application of the Constitution of the United States. (5), In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6), In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

"By Section 6 the Circuit Courts of Appeals 'shall exercise appellate jurisdiction to review, by appeal or writ of error,' final decisions of the Circuit Courts, 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.' The appellate jurisdiction not vested in this Court was thus vested in the Court created by the act, and the entire jurisdiction distributed."

Since the appellate jurisdiction which is *not* vested in the Supreme Court is the appellate jurisdiction thus vested in the Circuit Court of Appeals, it follows that the Circuit Court of Appeals has no jurisdiction in a case provided for by Section 5 of the act. The jurisdiction is distributed; it is not left to the option of a party to carry his case to either forum at his election. He is bound by the character of his case. And the character of the case is determined by the *criteria* specified in Section 5 of the act.

If the case necessarily involve the construction or application of the Constitution of the United States, then this Court has sole jurisdiction to determine all questions in the case, no matter in what form the constitutional question arises or is involved, whether it relate to the constitutionality of a law of the United States or of the Constitution or law of a state.

But Congress, not content with conferring exclusive jurisdiction upon the Supreme Court in cases which involved the construction and application of the Constitution of the United States, which would of course include a case involving the question whether a state Constitution or law was in contravention thereof,

went further and made a special provision for that particular class of constitutional questions—class 6 of Section 5.

In this special class a different test or criterion of jurisdiction is provided. The jurisdiction does not here depend upon whether a constitutional question is "*involved*," but upon the mere fact that *a claim is made* that the state Constitution or law contravenes the Federal Constitution. It is enough that the attack is made, that the state Constitution or law is in good faith impugned, to impress upon the case its character as one for the exclusive consideration of this Court.

This distinction has been recognized by this Court, as in *Muse* v. *Arlington*, 168 U. S., 430, and *Ansbro* v. *U. S.*, 159 U. S., 695, the Court has held that where the jurisdiction of the Supreme Court is invoked in cases within classes 4 and 5 of Section 5, the constitutional question must be *involved*, must require decision, and hence in cases which did not require the solution of the constitutional question, but could be determined on other grounds, the Circuit Court of Appeals, and not the Supreme Court, had jurisdiction, while in the cases of *Penn. Insurance Co.* v. *Austin*, 168 U. S., 685, and *Holder* v. *Aultman*, 169 U. S., 81, arising under class 6 of Section 5 of the act, this Court took jurisdiction by reason of the claim made in the case that the state law contravened the Constitution of the United States, although it was not found necessary to pass upon such claim and the cases were determined on quite other grounds, the only questions decided in the cases raising no constitutional issues.

II.

The second question is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to the constitutional question?"

We submit that this question should likewise be answered in the negative.

In *Penn. Insurance Co.* v. *Austin*, 168 U. S., 685, this Court upheld its jurisdiction in a case in which it was claimed that certain laws of Texas contravened the Constitution of the United States, although this claim not only did not present the sole question in the case, but as a matter of fact, it was not found necessary to decide the constitutional question, this Court affirming the judgment of the Circuit Court on the ground of laches of plaintiff in error in asserting his rights.

To the same effect is *Holder* v. *Aultman*, 169 U. S., 81, in which the Court say:

"This was a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, and was rightly brought directly to this Court by writ of error under the act of March 3, 1891, C. 517, Section 5, 26 Stat., 828. Upon such a writ of error, differing in these respects from a writ of error to the highest Court of a state, the jurisdiction of this Court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the Court below; and the jurisdiction of this Court is not limited to the constitutional question, but includes the whole case.

"But this Court has not found it necessary to pass upon the constitutional question, because it is of opinion that the contract is not within the statute set up by the defendant."

From these two cases it appears to follow: 1, That the Supreme Court has jurisdiction of a case in which it is claimed that a state law contravenes the United States Constitution, although there are other questions involved in the case, the determination of which may dispose of the case without requiring any decision upon the constitutional question; and, 2, That the Circuit Court of Appeals has no jurisdiction in such a case.

III.

The third question is:

"Does a record showing an instruction by the Circuit Court, directing a jury that the plaintiff is entitled to recover in his action under a state law upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States within the meaning of Section 5 of the act of March 3d, 1891, where the record of the Circuit Court does not affirmatively show that any

issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented, or considered or passed upon by the Circuit Court?"

If this question is answered in the affirmative it will necessarily involve the answering of the fourth question propounded by the Circuit Court of Appeals in the negative, since the disclosure of such a case as is stated in the third question necessarily gives to this Court jurisdiction under Section 5, and deprives the Circuit Court of Appeals of exercising jurisdiction under Section 6 of the act of March 3d, 1891.

It is submitted that this question should be answered in the affirmative, although no direct authority is found upon the proposition, and for this reason: This Court has frequently held that it is proper for the Circuit Court to direct a verdict for the plaintiff where there is no question of fact for the jury, or where it is clear that he is entitled to recover, or where the evidence is undisputed, or is so conclusive that the Court would set aside a verdict returned in opposition to it, or where all the defenses relied upon involve questions of law only.

Robertson v. *Edelhoff*, 132 U. S., 614.
No. Pa. R. R. Co. v. *Com. Bk. of Chicago*, 123 U. S., 727.
Del. L. & W. R. R. Co. v. *Converse*, 139 U. S., 469.
Elliott v. *Chicago, M. & St. P. R. R. Co.*, 150 U. S., 245.
Ralls Co. v. *Douglass*, 105 U. S., 728.
Anderson Co. Com'rs. v. *Beal*, 113 U. S., 227.

The statement of facts accompanying the question certified shows that there was no dispute as to the facts of this case, and that the controversy turned upon the statute of Indiana, upon which the plaintiff below relied for recovery. This being so, the question presented to the Court, upon this phase of the case, as shown from the statement of facts, was whether or not, those facts being admitted and proved beyond doubt, the plaintiff was, as a matter of law, entitled to recover under the Indiana statute. Unless, in any view that might be taken of the Indiana statute, either as to its validity, or construction or otherwise, the facts shown entitled the plaintiff to re-

cover, the instruction to the jury that under the statute the plaintiff was entitled to recover would have been erroneous. Hence, a general exception by the defendant to such instruction, the facts being undisputed, raises the question as to the validity, construction, application and all other elements connected with the Indiana statute. In order to have the propriety of the instruction reviewed, the defendant was not obliged to state that he excepted because the Indiana statute was unconstitutional, or because it did not apply to the facts of this case, or to specify any other reason for this exception. Unless, in any view which might be taken of the statutes, the plaintiff was entitled to recover, the instruction was erroneous and, therefore, the question of the constitutionality of the statute is necessarily involved in the instruction of the Court.

This Court has frequently held under a somewhat analogous, though much stricter, provision in regard to the review of the decisions of the highest Court of a state on a writ of error, that it is not always necessary that the Federal question which gives this Court jurisdiction upon such review should appear affirmatively on the record or in the opinion of the state Court if an adjudication of such question was necessarily involved in the disposition of the case by the state Court.

Willson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245.
Armstrong v. *Treasurer Athens Co.*, 16 Peters, 281.
Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574.
Eureka Lake & Yuba C. Co. v. *Sup. Ct. of Y. Co.*, 116 U. S., 410.
N. O. Water Works v. *La. Sugar Co.*, 125 U. S., 18.
Wilmington R. R. Co. v. *Alsbrook*, 146 U. S., 279.
Mobile & O. R. R. Co. v. *Tennessee*, 153 U. S., 486.

So here in instructing the jury that the plaintiff was entitled to recover under the Indiana statute, while it does not affirmatively appear that the exception was based in whole or in part upon the claim that that act was unconstitutional, that must necessarily have been adjudicated by the Circuit Court when it charged that the defendant was liable under that act.

IV.

The fourth question certified is:

"If it be considered that such record in the Circuit Court does not disclose a case in which it is claimed that the law of a state is in contravention of the Constitution of the United States, but such claim is made, so far as the record shows, for the first time in the Circuit Court of Appeals, by assignment of error, and is insisted upon at the bar, has the Circuit of Appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?"

The answer to this question appears to depend upon the view this Court may take of the right of a litigant to raise in the appellate court for the first time in the case a question of the constitutionality of a statute upon which a recovery was had in the trial Court. In the case at bar opposing counsel contends: 1, That the record shows no constitutional question dealt with, passed upon, or considered by the trial Court; and 2, That he nevertheless has the right to seek in the Circuit Court of Appeals a reversal of the judgment of the Circuit Court upon the ground that the statute upon which the judgment was based violated the Fourteenth Amendment of the Constitution of the United States.

We conceive that the contrary of each of these propositions is true. We have already attempted to show that on a record exhibiting an exception to a charge that the defendant was liable under a statute of a state, any reason in law why such statute should not impose liability may be submitted to the reviewing Court.

Passing this, however, our view is that the Circuit Court of Appeals is without power to consider such a question in the absence of a showing on the record that such question was determined by the Circuit Court. There either is or is not in the record a ruling of the Circuit Court upon the constitutionality of the state statute. If there is not in the record such a ruling, then there is nothing in the record on that point for the appellate court to consider, and no such question is presented to it for adjudication. If, however, such a record does contain such a ruling and the claim is made on such a record that the state law is in contravention of the Constitution of the United States, then

the case is within Section 5 of the Act of Congress, and the Supreme Court has sole jurisdiction.

If it were not so, then the provisions of Section 5, forbidding questions of this nature to be reviewed by any lesser tribunal than the Supreme Court, could in any statutory case be evaded. It would only be necessary for counsel to refrain from questioning in the Circuit Court the constitutionality of a statute involved and reserve the point for his assignment of errors and argument in the Circuit Court of Appeals. This is precisely what is attempted in the present case, and, as it seems to us, is guarded against by the phraseology of Section 5 of the act.

Whatever might have been the reason actuating Congress in singling out this particular class of constitutional questions for the exclusive consideration of this Court, whatever the motive that dictated the provision that in this particular class of constitutional questions, the mere claim made by a litigant in the case should at once stamp upon it its character as one for the exclusive consideration of this Court, certain it is that such purpose would be practically defeated and the validity of the Constitution and laws of the states would be subject to be passed upon, perhaps differently in different cases, by any one of the Circuit Courts of Appeals of the United States before whom the party assailing the state law or Constitution saw fit to first develop his attack.

As we view it this was not the intention, nor does the statute by its terms permit any such perversion. It seems to us that a litigant has his right to so try his case in the Circuit Court that the record will show what questions are preserved for review by the upper Court. If a claim that a state law is unconstitutional may legitimately be predicated upon such record he may carry his case to the Supreme Court; if not, and he makes no such claim in the case, he may go to the Circuit Court of Appeals. If, however, as in the case at bar, he, taking his chances whether or not his record will bear him out in his claim, does in fact carry the case to the Circuit Court of Appeals on a claim that the state law is unconstitutional, then that Court is without jurisdiction, for the fact that such claim is made in good faith in the case brings it within the provisions of Section 5 of the Act of Congress, and he must carry his case to the Supreme Court and

stand or fall there by his record. He can not present and urge such claim in the Circuit Court of Appeals without regard as to whether the record in the case contains the claim or not, and ask that the constitutional question be there decided, whether shown to have been decided by the trial Court or not. This is what is attempted in the case at bar, and we submit that if a party presents on error a claim in his case that a state law is in contravention of the Constitution of the United States, he thereby makes a case in which the Circuit Court of Appeals is without jurisdiction. Such a case must go to this Court, and if the Court find that the record justifies the presentation to a reviewing Court of such a claim then this Court will take the whole case. If the record does not justify the assignment of such a claim for error, then as long as that claim is persisted in neither this Court nor the Circuit Court of Appeals has jurisdiction, the former because the record does not disclose such an an issue before the trial Court, and the latter because the case is a case in which the claim is made that the law of a state is in contravention of the Federal Constitution.

All of which is respectfully submitted.

CHARLES M. CIST,
HARLAN CLEVELAND,
Counsel for Defendant in Error.

EDGAR W. CIST,
Of Counsel.

No. 259

Brief

OCT 8 1898

Supreme Court of the United States

OCTOBER TERM, 1898.

THE CHESAPEAKE, OHIO & SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

E. P. THEBAUD, Administrator of C. Spurgeon, deceased,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief on Motion to Advance on the Docket.

CHARLES M. CIST,
Counsel for Defendant in Error.

THE COURT INDEX PRESS.

Supreme Court of the United States.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY,

Plaintiff in Error,

vs.

B. F. THIEBAUD, Administrator of C. Sweetman, deceased,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief on Motion to Advance on the Docket.

We submit that this case should be advanced on the docket for the reason that the question involved is of grave public importance, relating as it does to the power and authority of the Circuit Courts of Appeals of the United States to exercise jurisdiction over and to finally determine cases which require, for their proper adjudication, the interpretation of the Constitution of the United States.

The first and most important question certified is:

"Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed

that a law of a state is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?"

The Circuit Courts of Appeals of the First, Third, Fourth, Fifth, Seventh and Eighth Circuits have held that they are without jurisdiction in such cases.

Wrightman v. *Boone Co.*, 88 Fed., 435.
Indianapolis v. *Trust Co.*, 83 Fed., 529.
Holt v. *Mfg. Co.*, 80 Fed., 1.
Hamilton v. *Brown*, 53 Fed., 753.
Green v. *Mills*, 69 Fed., 852.
Pauley Co. v. *Crawford Co.*, 84 Fed., 942.
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Westerly v. *Westerly Water Works*, 76 Fed., 467.
Davis & Rankin Co. v. *Barber*, 60 Fed., 465.

In *Wrightman* v. *Boone Co.*, 88 Fed., 435, which was a case in which it was claimed that a law of Arkansas was in contravention of the Constitution of the United States, the Circuit Court of Appeals say:

"Section 5 of the act of March 3d, 1891, 26 Stat,, 828, C. 517, declares that appeals may be taken to the Supreme Court (6) in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Section 6 provides that in cases other than those provided for in Section 5, the Circuit Court of Appeals may exercise appellate jurisdiction, unless otherwise provided for in Section 5, and consequently this Court has no jurisdiction of it. A careful examination of these sections of the act of Congress in *Hastings* v. *Ames*, 68 Fed., 726, and in *Pauley* v. *Crawford Co.*, 84 Fed., 942, led us to the conclusion that if it is claimed that a law of a state is void because it contravenes the Constitution of the United States, a Circuit Court of Appeals has no jurisdiction of the case, though it may involve the consideration of many other questions."

The Circuit Court of Appeals for the Sixth Circuit, however, exercises jurisdiction in cases brought before it of this character unless objection to the jurisdiction is specially interposed.

It is of public importance in the interest of uniformity in the administration of justice in the Circuit Courts of Appeals that this question of their jurisdiction should be speedily determined, especially as the question touches the power of those Courts to deal with and finally determine constitutional questions of the highest importance and frequently of the gravest public concern, which questions are particularly reserved by the Judiciary Act for the consideration of this Court. If the Circuit Courts of Appeals are without the power it would be seem of consequence to the public that the law should be so settled by this Court in order to prevent the diversity of practice from creating possible confusion and causing in some cases the loss of the remedy.

We have therefore moved the Court to advance this cause on the docket.

Respectfully submitted,

CHARLES M. CIST,

Counsel for Defendant in Error.

No. 271.

Brf. of Maxwell for P. in Error.

Office Supreme Court U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 271.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
Plaintiff in Error,

vs.

BENJAMIN F. THIEBAUD, Administrator of Chris Sweetman, Deceased.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

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In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

This was an action for wrongful death commenced in the circuit court by Thiebaud, administrator, against the Railroad Company. After verdict and judgment in favor of the plaintiff, the Railroad Company sued out a writ of error from the circuit court of appeals for the sixth circuit. The case being docketed in that court, Thiebaud moved to dismiss it, upon the ground that the writ should have been taken from this court, and that the circuit court of appeals was therefore without jurisdiction. The Railroad Company resisted the motion, insisting that the record did not show that any question as to the

constitutionality of the statute of Indiana was raised or decided by the circuit court, and citing Ansbro vs. U. S., 159 U. S., 695, to the proposition that an assignment of errors can not be used to import a constitutional question into the cause which the record does not show was raised and decided below, so as to give this court jurisdiction under the fifth section of the act of March 3, 1891; also citing Carey vs. Houston & Texas Central Ry. Co., 150 U. S. 170, 181, and Northern Pacific Railroad Co. vs. Amato, 144 U. S. 465, 472.

The circuit court of appeals, however, was in doubt whether the writ of error should have been sued out from this court, and accordingly, instead of overruling Thiebaud's motion, certified certain questions to this court, which are now docketed here under the title of the Cincinnati, Hamilton & Dayton Railway Company, plaintiff in error, vs. Benjamin F. Thiebaud, Administrator of Chris Sweetman, No. 259, October Term, 1899.

Thereupon the Railroad Company sued out the present writ of error from this court. The ground upon which it did so is stated in its petition for the writ filed in the circuit court (Rec. 17) to wit:

"The defendant shows to the court that, having duly prosecuted the writ of error heretofore allowed by the court to the United States Circuit Court of Appeals for the sixth circuit, the plaintiff in this case, being the defendant in error, filed a motion in said circuit court of appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States instead of to the United States Circuit Court of Appeals, and that said circuit court of appeals was therefore without jurisdiction upon said writ of error.

Said circuit court of appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States Circuit Court of Appeals was properly

allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the circuit court of appeals has jurisdiction thereof, now prays for a writ of error to the Supreme Court of the United States, and assigns for error." [Here follow the assignments of error.]

Judge Taft granted the petition and allowed the writ, as shown by the following order, which he entered in the circuit court (Rec. 18).

"This cause came on to be heard upon the defendant's petition for allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the circuit court of appeals for the sixth circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States circuit court of appeals, said petition is now granted and a writ of error, as prayed, is allowed to the Supreme Court of the United States."

In view of the fact that Thiebaud, administrator, insisted in the circuit court of appeals that the writ of error should have been sued out from this court, and that he induced the circuit court of appeals to certify to this court the question of jurisdiction, which he himself raised, he should be required to await the decision of this court on the hearing of that certificate in case No. 259. He ought not to be permitted to take in this court a position exactly the opposite of what he took in the circuit court of appeals; to say in that court, because it suited his purpose then, that this court alone had jurisdiction, and then, when the case reaches this court, to turn about and say that the circuit court of appeals alone has jurisdiction. It is at least strange for him to suggest to this court, under the circumstances, that the present writ "is taken for delay only."

The following extract from the certificate of the circuit court of appeals, now docketed in this court as case No. 259, October

term, 1899, shows the grounds upon which Thiebaud moved to dismiss the writ in that court.

"Thereupon the defendant in error [erroneously printed plaintiff in error] moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a state is in contravention of the Constitution of the United States, and that, therefore, under Section 5 of the Act of Congress, approved March 3, 1891 (26 Stat., 826), *the writ of error should be taken from the Supreme Court of the United States and not from this court.*

The court is in doubt whether the case is within the provisions of said section of the Act of Congress, and, therefore, upon the foregoing statement of facts, it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:" [Here follows statement of the questions certified.]

Of course if the proceeding in error in the court of appeals was without jurisdiction, as claimed by Thiebaud, its pendency was no bar to suing out a second writ from this court; nor was there any impropriety, under the circumstances, especially in view of the doubt which the circuit court of appeals itself expressed concerning its jurisdiction, in the precautionary course that the Railroad Company pursued, and which Judge Taft approved, in suing out a second writ of error from this court. If the Railroad Company had awaited the determination by this court, in case No. 259, of the question whether the circuit court of appeals had jurisdiction, and that question had been decided adversely, it would then have been too late for the company to sue out a writ of error from this court.

In Pullman Palace Car Co. vs. Central Transportation Co., 39 U. S. App., 307; 76 Fed. 401, the appellant, having taken an appeal to this court, and being in doubt whether this court or the circuit court of appeals had jurisdiction, took a second appeal to the circuit court of appeals. The latter court declined

to dismiss the appeal pending the decision of this court. In this court (171 U. S. 145), Mr. Justice Peckham, referring to the ground upon which the appeal had been taken here, said: "There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the circuit court of appeals. We think that by this action he did not waive any right of appeal which he would have otherwise have had."

We submit that, under the circumstances of this case, the court should postpone the consideration of the present motion to dismiss, until the hearing of the certificate sent up by the circuit court of appeals, which presents the question of jurisdiction, being case No. 259. If Thiebaud has experienced a change of heart and is sincere in his present claim that it is the circuit court of appeals, and not this court, that has jurisdiction, he should dismiss his motion in the circuit court of appeals, and apply for leave there and here to withdraw the certificate which is docketed here as No. 259.

The present motion appears to be an effort to force a submission of the merits of the case on briefs, under the claim that there is color for the motion to dismiss, and that the writ was sued out for delay. But the record does not warrant the latter suggestion. We desire to argue the merits of the case orally, either in this court or in the circuit court of appeals, as the jurisdiction of the one or the other may be finally established. When that opportunity presents itself, we hope to be able to show by recent decisions of the Supreme Court of Indiana, construing the Act of 1893, and by the decisions of the courts of England construing her Employers' Liability Act of 1880, from which the Indiana statute was taken with important modifications, that the conductor and engineer of the freight train, through whose negligence Sweetman was killed, were his fellow servants, and that their common law relation as such is not changed by the statute on which the plaintiff relies for recovery.

We think it is also very clear, under the decisions of the Supreme Court of Indiana, that Thiebaud's appointment as administrator by the circuit court of Fayette county in that state was absolutely null and void. Indeed opposite counsel have apparently taken the same view, because since the judgment below in this case, they have had another administrator of Sweetman's estate appointed in Ohio, in whose name they have commenced an action for his death against the Railroad Company, which is now pending in the court of common pleas of Hamilton county, Ohio.

We hope also to show that the plaintiff, having been appointed administrator in Indiana alone, could not maintain his action in Ohio. The general rule is not denied by our adversaries. They rely solely upon a statute of Ohio passed in 1840, which authorizes foreign administrators to maintain suits in Ohio "in their capacity as administrator." But this statute, passed long before actions for wrongful death were known, relates only to suits to recover "assets" which have devolved upon an administrator as such. It does not cover suits brought by an administrator as a nominal party, for the use and benefit of others, to enforce a cause of action which is not "assets" of the estate, and which does not vest in the administrator "in his capacity of administrator."

There is also grave doubt of the plaintiff's right to maintain an action in a federal court in Ohio, brought nominally and in fact for the use and benefit of persons who are admitted to be citizens of the same state as the defendant.

But we do not propose now to discuss these questions but only to suggest them, in order to repel the insinuation that this writ "is taken for delay only." They are fully presented in our brief on the merits, which was filed in the circuit court of appeals before Thiebaud made his motion to dismiss the proceeding in error in that court for want of jurisdiction. The difficulty he experienced in meeting the case on its merits may ac-

count for his tactics in challenging the jurisdiction, first of the circuit court of appeals, and then of this court, but we surely have a right either in this court or in the court of appeals to have the merits of our writ of error presented and heard in the usual way.

We respectfully ask that the motion to dismiss be postponed until the hearing of No. 259. A litigant who insists in the circuit court of appeals that this court alone has jurisdiction, and induces that court to certify the question, and then in this court insists that it has no jurisdiction, hardly presents a record of good faith entitling him to special consideration.

LAWRENCE MAXWELL, Jr.,
Counsel for the Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 271.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF THE ESTATE OF CHRIS. SWEETMAN, DECEASED.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE AND ASSIGNMENT OF ERRORS.

Action for wrongful death. Verdict and judgment for the plaintiff. The deceased was a locomotive engineer running an engine drawing the pay-car. He was killed in a collision caused by the negligence of the conductor and engineer of another train (Rec., p. 8). It is well settled that the negligent conductor and engineer were fellow-servants of the deceased, and that the company was not therefore liable for their negligence (New England Railroad Co. *vs.* Conroy, 175 U. S., 323; Baltimore and Ohio Railroad Company *vs.* Baugh, 149 U. S., 368; Northern Pacific Railroad Company *vs.* Hambly, 154 U. S., 349; Northern Pacific Rail-

road Company *vs.* Peterson, 162 U. S., 346; Northern Pacific Railroad Company *vs.* Charless, 162 U. S., 359; Martin *vs.* Atchison, Topeka & Santa Fé Railroad Company, 166 U. S., 399; Northern Pacific Railroad Company *vs.* Poirier, 167 U. S., 48; Alaska Mining Company *vs.* Whelan, 168 U. S., 86; Becker *vs.* B. & O. R. R. Co., 57 Fed., 188, Indiana).

The plaintiff claims, and the circuit court held, that the rule is changed, and that the defendant is made liable by the act of Indiana of March 4, 1893, Rev. Stat., 1894 (Burns), section 7083, which we print as an appendix to this brief.

We claim—

1. That the case is not within the provisions of the act.

2. That the circuit court was without jurisdiction, because the widow and children, for whose benefit the action was brought, were citizens of the same State with the defendant.

3. That the plaintiff's appointment as administrator was void, and that the circuit court erred in holding that the appointment could not be collaterally attacked, and in excluding evidence to show that it was void.

4. That the plaintiff cannot maintain the action in Ohio by virtue of his appointment as administrator in Indiana, even if that appointment be valid.

The following brief was printed for the circuit court of appeals. Upon the construction of the Indiana statute we add the case, since decided, of Hodges *vs.* Standard Wheel Co., 152 Ind., 680, 691, in which it was held that the plaintiff must show that the person whose negligence caused the injury "was a person in the service of appellee, to whose order or direction under the particular circumstances of the case he, as an employé of appellee, was 'bound to conform and did conform.' '*Ita lex scripta est.*' The law is so written and means what it expressly declares."

Also Slocum *vs.* Pomery, 6 Cr., 221, and Garland *vs.* Davis, 4 How., 131, to the proposition that anything which would have been fatal upon a motion in arrest of judgment is fatal upon a writ of error, although objection was not taken in the court below.

ARGUMENT.

I.

The Case is not within the Provisions of the Act of 1893.

It is claimed that it comes within subdivision 4 of Sec. 1;

"Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe, or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The purpose of this provision of the statute was to change the law of fellow-servant, theretofore prevailing in the state, as declared by the decisions of its Supreme Court. But it applies only to persons who are "obeying or conforming to the order of some superior *at the time of such injury*, having authority to direct." This was not Sweetman's case. He was running an engine drawing the pay car. It will not be presumed that he "was obeying or conforming to the order of some superior, at the time of such injury, having authority to direct." There is no such allegation in the petition, nor indeed is any other *fact* alleged to bring the case within the provisions of the statute.

The statute has been construed by the Supreme Court of Indiana in two cases; Baltimore & Ohio S. W. Ry. Co. vs. Little, 149 Indiana, 167; 48 N. E. Rep. 862, and Pittsburgh, C. C. & St. L. Ry. Co. vs. Montgomery, 49 N. E. Rep. 582. The first case was an action by a locomotive engineer to recover damages suffered in a collision caused by the negligence of a head brakeman in failing to close and lock a switch. The court held that

the head brakeman was a fellow-servant of the engineer, not removed from that relation by the act, and that the plaintiff could not recover.

The second case was an action by a freight brakeman injured by the negligence of the engineer in charge of the train. It appeared "that the conductor of said train, acting in the service of appellant, the authority and position of said conductor making it appellee's duty to obey his orders with respect to said train and switching, ordered appellee to go between said cars to make couplings, and while so engaged the engineer in charge of said train, also in appellant's service, and in the line of his duty, without signal, carelessly, negligently and recklessly reversed said engine and applied full steam, whereupon said cars were driven and jammed together with terrific force, without notice to appellee, whereby appellee's entire right hand was caught between the bumpers and mashed off, without any fault on his part" (49 N. E. 584).

The court held that this made a case under the statute, upon the ground that the plaintiff was "obeying the order of some superior at the time of such injury, having authority to direct."

The judges were not agreed as to the meaning of the words "the said person, co-employe or fellow-servant, at the time acting in the place and performing the duty of the corporation in that behalf," but all the judges agreed that the concluding clause, "the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct," qualifies all that precedes. For the purposes of the case they thus state subdivision 4;

"Where such injury was caused by the negligence of any person in the service of such corporation, who has charge of any * * * locomotive engine upon a railway * * * and the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct" (49 N. E. 584).

The statute was evidently based upon the English Employer's Liability Act of 1880, which we print as an appendix. A com-

parison of the corresponding sections of the two statutes (Sec. 1, Subd. 4 Indiana, and Sec. 1, Subd. 5 English) shows the important modification of the English Statute introduced into the Act of Indiana.

It had been "firmly established as the law of Indiana" that "servants engaged in the same general line of duty are fellow-servants, although one may be a superior and the others may be subordinate servants under his immediate direction and control." Such is the statement of the law of that state made by Elliott, J., in Indiana Car Co. vs. Parker, 100 Ind. 181, 185, 186, an action in which it was held that the Car Company was not liable for an injury to a workman in its shop, caused by the foreman's negligence. The judge, citing many cases in that state, and in other courts, said further:

"We concur with counsel in the statement of the general principle, that a foreman is a fellow-servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman, the master is not responsible to a fellow-servant. The overwhelming weight of authority sustains this general doctrine, and our own court has been one among its staunchest supporters, as a long line of decisions attest."

The following are instances of persons held to be fellow-servants by the decisions of the Supreme Court of Indiana prior to the Act of 1893. Section foreman and members of his gang, Justice vs. Pennsylvania Co., 130 Ind. 321, 325; locomotive engineer and engine cleaner working under him, Spencer vs. Ohio & M. Ry. Co., 130 Ind. 181; car inspector and servant employed in loading cars, Neutz vs. Jackson Hill Co., 139 Ind. 411; conductor and train crew engaged under his orders in making a running switch, Sheets vs. Chicago, etc., Ry. Co., 139 Ind. 682; engineer and train hand Evansville, etc., R. R. Co. vs. Henderson, 134 Ind. 636, 641; member of one section gang and boss of another gang, Clarke vs. Pennsylvania Co., 132 Ind. 199.

2. We submit whether the statute applies at all in case of an injury resulting in death, in view of Sec. 3, which declares that "in such case the action shall survive and be governed in all respects by the law now in force as to such actions."

It is a familiar rule that such statutes, being in derogation of the common law, are to be construed strictly. Smith vs. Chicago, M. & St. P. Ry. Co. 91 Wis. 503, and cases cited; P. C. C. & St. L. Ry. Co. vs. Hine, 25 Ohio St., 629, 634.

II.

The Statute Contravenes the Fourteenth Amendment, and also the Constitution of Indiana.

It makes corporations liable simply because they are corporations; individuals, joint stock companies and co-partnerships not being liable under the same circumstances. Such a discrimination between corporations and all other persons is not permissible under a system of law which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law." The Constitution of Indiana, under which, as under the Federal Constitution, it is held that a corporation is a citizen within the meaning of the law, declares that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens" (Art. 1, Sec. 23).

Smith vs. Louisville & Nashville Railroad Co. 75 Ala. 449, was an action brought under a statute, which the court held to be unconstitutional, upon the ground that it discriminated between corporations and private associations and other persons, and therefore denied to the former the equal protection of the law. This is the statute:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of per-

sons, for such wrongful act or omission, and may recover such damages as the jury may assess."

Stone, J., said:

"Is the act copied above constitutional? It will be observed that under the statute, the action lies only against certain classes; corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers, and agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law, and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or, if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of the business, and the wrongful act or omission of the agent be, in each case, the same. How this will work, will readily suggest itself. If the employer being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act, by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business, and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?"

The court closes its opinion with the following observation:

"We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion" (p. 452).

In Soon Hing vs. Crowley, 113 U. S. 703, it was held that:

"Municipal restrictions imposed upon one class of persons en-

gaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws."

Mr. Justice Field, delivering the opinion, said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions" (113 U. S. 709).

In Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150, a statute of Texas which singled out railway corporations and made them alone liable for attorneys' fees, for failing to pay claims of a certain class, was held to contravene the Fourteenth Amendment, on the ground that it denied to railway companies the equal protection of the law. We ask the attention of the court to the cases in state courts referred to in the opinion of Mr. Justice Brewer (pp. 163-165) "in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right." He said, quoting with approval the language of Black, J., in State vs. Loomis, 115 Mo. 307, 314:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations" (165 U. S. 155, 156).

Again,

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo. vs. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their

development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (pp. 159, 160).

Again,

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection" (p. 165).

In State ex rel. vs. Sheriff of Ramsey County, 48 Minn. 236; 51 N. W. 112, the court held unconstitutional an Act prohibiting the emission of dense smoke within the limits of a city, upon the ground that it excepted "manufacturing establishments using the entire product of combustion, and the heat, power and light produced thereby, where they are generated or within a radius of three hundred feet therefrom." The court said:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is

produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable" (pp. 240, 241).

The objection to the statute at bar is that suggested by Gilfillan, C. J., in Lavallee vs. St. Paul M. & M. Ry. Co., 40 Minn. 249; 41 N. W. 974, that it makes a classification based "*not on the character of the employment, nor of the dangers to which the employes are exposed, but on the character only of the employers.* We can see why the employer's liability should be greater when the business is that of operating a railroad, *but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same.*"

Viewed from the standpoint of the servant, the statute gives to those who are in the employ of corporations rights which it denies to those who are in the employ of individuals, co-partnerships or joint stock companies, although they may be carrying on the same business under similar circumstances.

In Deppe vs. Railroad Co., 36 Iowa, 52, 55, the court puts this illustration:

"Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the railroad employe can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation."

In Johnson vs. St. Paul & D. Ry. Co. 43 Minn. 222, 45 N. W. 156, the court said:

"If a distinction is to be made as to the liability of employers

to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions, unless upon the theory suggested in Railway Co. vs. Mackey, 127 U. S. 205, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,'—a proposition which, as thus broadly stated, that court, in view of its later utterances, could hardly have intended to announce. Indeed, the particular question now under consideration was not before the court, and, presumably, was not in mind. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists."

The statutes involved in the three preceding cases were held to be constitutional: we quote the opinions to show the tests that were applied to accomplish that result. The application of the same tests to the Indiana statute demonstrates its invalidity.

The question urged at bar was not presented in Missouri Pacific Railway Company vs. Humes, 115 U. S. 512; nor in Missouri Pacific Railway Company vs. Mackey, 127 U. S. 205; nor in Chicago, Kansas & Western Railroad Company vs. Pontius, 157 U. S. 209; nor in St. Louis & San Francisco Railway Company vs. Matthews, 165 U. S. 1; nor in Peirce vs. Van Duzen, 47 U. S. App. 339; 78 Fed. 693. The statutes involved in those cases did in fact apply to railway corporations alone, but it was not claimed or suggested in either case that they contravened

the Fourteenth Amendment, because they did not apply equally to railroads owned or operated by persons or co-partnerships. No such question was presented or decided. Nor did either of those statutes undertake to classify *employers* generally, distinguishing corporations from individuals and co-partnerships. They classified *occupations*, distinguishing the operation of railroads from all other *occupations;* whereas the statute of Indiana classifies, not occupations, but employers, making *all* employers *in any* occupation liable, if they happen to be corporations other than municipal, while relieving them from liability, although engaged in the same occupation and under the same circumstances, if they happen to be individuals or co-partnerships.

But the court is asked to strike out the provisions of the Act relating to "other corporations" and to sustain it as an act applying to railroad corporations alone. There are two objections to such a course. In the first place the constitutional objection to the Act is not thereby removed, because it would still discriminate between railroads owned by individuals or copartnerships or joint stock companies (which are not corporations, Chapman vs. Barney, 129 U. S. 677; Gregg vs. Sandford, 28 U. S. App. 313; 65 Fed. 151), and those owned by corporations. If the railway business is to be regulated, the regulation must apply to all persons engaged in the business. It can not discriminate between corporations and other persons operating railroads under the same circumstances. Nor is it material whether this statute would apply to receivers of corporations as held in Peirce vs. Van Duzen, 47 U. S. App. 339; 78 Fed. 693; contra Burke vs. Dillingham, 23 U. S. App. 153; 60 Fed. 729. Under no construction can it apply to individuals or copartnerships, Beeson vs. Busenbark, 44 Kans. 669. The danger of operating railroad trains is the same whether operated by corporations or co-partnerships or individuals. While railroads are usually operated by corporations, there is nothing in the law of Indiana to prevent individuals

or co-partnerships from purchasing and operating railroads. It is in fact quite common for railroads to be purchased at receiver's sales and temporarily operated by individuals.

The other objection to the proposed judicial amendment of the statute is equally serious. It is aptly expressed in the words used by Chief Justice Waite in United States vs. Reese, 92 U. S. 214, 221, and in Baldwin vs. Franks, 120 U. S. 678, 686:

"To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one."

To enforce the statute as one passed in the exercise of the police power for the regulation of railroads (which is what the plaintiff asks the court to do) is not "to give effect to what appears to have been the intent of the legislature;" and that, as suggested by Chief Justice Waite in Allen vs. Louisiana, 103 U. S. 80, 84, is always the test.

The legislature has not undertaken to regulate or classify *occupations*, but to classify *employers*, putting in one class *corporations*, other than municipal, no matter what their business, and in another class all other *persons*, no matter in what business engaged, even if it be that of operating a railroad. The court is not at liberty to reject the classification thus declared by the legislature and to enforce the statute on an entirely different basis. The question before the court is whether the classification proposed by the legislature is valid; not whether their act could be sustained if they had declared some other classification on a wholly different basis.

In Warren vs. Mayor and Aldermen of Charlestown, 2 Gray, 84, Shaw, C. J., said:

"The same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the

legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and that some parts are unconstitutional, all the provisions that are thus dependent, conditional or connected, must fall with them."

The foregoing passage is quoted with approval in Allen vs. Louisiana, 103 U. S. 80, 84, Chief Justice Waite adding:

"The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

In Pollock vs. Farmers' Loan and Trust Company, 158 U. S. 601, 635, 636, the income tax law of 1894 was upset because it constituted "one scheme of taxation," some of whose provisions were illegal. The Chief Justice quotes the test proposed by Mr. Justice Matthews in Poindexter vs. Greenhow, 114 U. S. 270, 304, viz:

"To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact."

But these decisions do not really touch the case at bar. We have not before us two parts of a statute, one lawfully regulating one occupation and another attempting unlawfully to regulate another occupation; but a single statute undertaking to classify employers without reference to their occupations, and the simple question is whether *the classification attempted* can be sustained, or whether it discriminates unlawfully.

III.

The Circuit Court did not have Jurisdiction.

The petition alleges that the plaintiff "brings the action *for the benefit* of Mary K. Sweetman, widow, and Clara M. Sweetman and Charles C. Sweetman, children of Chris Sweetman, *who* have been damaged by reason of the death as aforesaid of plaintiff's intestate in the sum of $10,000" (Rec. 2). The petition does not state the citizenship of the parties for whose benefit the action is alleged to be brought, but it affirmatively appears by the bill of exceptions that they are citizens of the same state as the defendant (Rec. 10).

The defendant moved to dismiss the case for want of jurisdiction, but the court overruled the motion holding that it had jurisdiction because the administrator was a citizen of Indiana (Rec. 10).

A claim for wrongful death under the statute of Indiana is not assets of the deceased. Jeffersonville Railroad vs. Swayne, 26 Ind. 477. It belongs to the beneficiaries named in the statute; in this case to the widow and children. The extent to which this is true is shown by the fact that no action lies unless there are beneficiaries. Indianapolis P. & C. R. R. Co. vs. Keeley's Admr., 23 Ind. 133, 136; Jeffersonville Railroad Company vs. Swayne's administrator, 26 Ind. 477, 485; Jefferson M. & I. R. R. vs. Hendricks, 41 Ind. 48, 77; Sorensen vs. Northern Pacific Railroad Company, 45 Fed. 407. The contributory negligence of the beneficiaries defeats the action, Bamberger vs. Citizens St. Ry. Co., 95 Tenn. 18; 31 S. W. Rep. 163, 168, or in the event of the contributory negligence of one of several beneficiaries, his share of the recovery. Wolf, Administrator, vs. Railway Co., 55 Ohio St. 517. In this latter case the court held (syllabus):

"In actions in the name of an administrator under sections 6134 and 6135, Revised Statutes, the administrator is a *mere nominal party*, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named.

2. In arriving at the total amount of damages in such cases, the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding ten thousand dollars.

3. In such actions the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries, will not defeat the action as to others, who were not guilty of such negligence."

The character of the action is further disclosed in the following passages from the opinion of Burket, J.:

"Such defense can not be made as to the negligence of the administrator, because he is a mere nominal party, and has no interest in the damages to be recovered. The contributory negligence of the deceased is not strictly speaking, a defense but a condition which prevents the liability from arising. But the contributory negligence of the beneficiaries, who are to receive the damages, and for whose benefit the action is brought, in the name of the administrator, is clearly a defense to the action available to the person or corporation causing the injury" (pp. 533, 534).

"It therefore seems clear that in arriving at the total amount of damages to be awarded under the statute as amended, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum, which sum should be distributed among the beneficiaries not found guilty of contributory negligence. As to beneficiaries found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which, if any, of the beneficiaries were guilty of such contributory negligence. This would no more complicate the trial than is usual in trials for torts, in which it often occurs that some are discharged, and others held liable."

"Take the case at bar, it may be that on the trial when the case gets back into the Common Pleas it shall appear that the father of the little boy was free from all fault or negligence, and that the mother was guilty of negligence which contributed directly to the death. In such case the jury should assess the damages, if any, which the father has sustained, and return a verdict for that

amount only, and award no damages whatever for the benefit of the negligent mother" (pp. 535, 536).

"It is therefore clear that the statute throughout is distributive in its character, and that the damage should be assessed only for the benefit of those who are not guilty of contributory negligence, and that when recovered the damages should be distributed by the probate court only among such as the verdict of the jury shall show to be entitled thereto. This throws no clog in the way of the prosecution of the action by the administrator, and awards damages to those who are without fault, and does not reward those who contributed to the injury" (p. 537).

In City of Friend vs. Burleigh (Nebraska), 74 N. W. 50, the court said:

"This cause of action did not belong, and does not belong to the estate of the decedent. It belongs to his widow and next of kin, and was not, and is not, and can never become, an asset of his estate."

In every real and substantial sense, the claim sued on is a claim of Mary K. Sweetman, Clara M. Sweetman and Charles C. Sweetman, citizens of Ohio, against the Cincinnati, Hamilton & Dayton Railroad Company, also a citizen of Ohio. It is true that the statute of Indiana authorizes an action in the name of the administrator, but he does not recover as administrator. The damages "inure to the exclusive benefit of the widow and children" (Sec. 285). The provision for bringing the action in the name of the administrator is a section of the Code of Procedure of Indiana, which controls the courts of that state, but in this court no reason is apparent why the action might not be maintained in the name of the real parties in interest, for whose use and benefit indeed the present suit is brought, according to the express allegations of the petition. But assuming that the action must be brought in this court in the name of the administrator, in conformity with the decision in Weidner vs. Rankin, 26 Ohio St. 522, it is still true that the "controversy" in the sense of the Constitution is between citizens of the same state. In Wolf, Administrator, vs. Railway Company, 55 Ohio St. 517, 530, the court while saying that the

action must be brought in the name of the personal representative as a nominal party points out that "the statute does not even say that he shall bring the action, but says that it shall be brought in his name for the exclusive benefit of the beneficiaries."

If the plaintiff's device succeeds every action for wrongful death, may, at the election of the claimants, be brought in the Federal courts.

Where an administrator sues to recover property vested in him as such, his citizenship is doubtless the test of jurisdiction in the Federal courts, and the same is true of a suit brought by a trustee of a mortgage suing upon a contract made with him. But that is not this case. This is an action in tort, brought by a nominal formal party, for the use and benefit of other parties, to recover damages which have accrued to them.

State of Indiana vs. Glover, 155 U. S. 513, was an action brought in the name of the State of Indiana on the relation of Stanton, a citizen of New York, against Glover and other citizens of Indiana on an official bond given by Glover. The court held that the Circuit Court had jurisdiction because Stanton was the real party in interest, although the action was brought in the name of the state. Stanton was himself a trustee. The Chief Justice takes pains to say that "Stanton *and his cestuis qui trust* were citizens of other states than Indiana" (155 U. S. 517).

In Maryland vs. Baldwin, 112 U. S. 490, it was held that "a suit on an administrator's bond, taken in the name of a state for the benefit of parties interested, is for the purpose of jurisdiction, to be regarded as a suit in the name of the party for whose benefit it is brought." Mr. Justice Field said:

"The name of the state is used from necessity when a suit on a bond is prosecuted for the benefit of the person thus interested, and in such cases the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the Circuit Court of the United States has jurisdiction" (112 U. S. 491).

McNutt vs. Bland, 2 How. 9, was a similar case. Mr. Justice

Baldwin, referring to the provision of the constitution which extends the judicial power of the United States to controversies between citizens of different states and to the judiciary act, said:

"Both look to things, not names, to the actors in controversies and suit, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law" (2 How. 14).

In Maryland, actions for wrongful death must be brought in the name of the state "for the use of the persons entitled to damages." Rev. Code 1878, p. 724. Is the state in such an action any more or less a nominal and formal party than the administrator at bar?

Stewart vs. Baltimore & Ohio Railroad Company, 168 U. S. 445, was an action brought in the Supreme Court of the District of Columbia for the benefit of the widow to recover damages caused by the death of the husband and intestate in a collision in the state of Maryland. The Supreme Court, reversing the judgment of the Court of Appeals of the District of Columbia, held "that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland." Mr. Justice Brewer said:

"The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. Browne vs. Strode, 5 Cranch, 303; M'Nutt vs. Bland, 2 How. 9; State of Maryland, for use of Markley, vs. Baldwin, 112 U. S. 490.

See, also, Gaither vs. Farmers' & Mechanics' Bank of Georgetown, 1 Pet. 37, 42, in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcoran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form, *the cestui que use is regarded as the real party to the suit.*' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that *the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought;* and the courts of either jurisdiction will see that the damages awarded pass to such party."

It will be noticed that the action was not brought under the Act of Congress, which provided for recovery only "in case the act causing death is done within the limits of the District of Columbia," but to enforce a cause of action created by the statute of Maryland. And the point decided was that, although the statute creating the right directed that "every action" to enforce it "should be brought by and in the name of the State of Maryland," an action might nevertheless be maintained in the federal courts in the name of an individual (in that case an administrator) for the use of the person intended to be benefited by the statute, the latter, for "purposes of jurisdiction in the federal courts" and not the nominal plaintiff, being regarded as the real party in interest.

Huff vs. Hutchinson, 14 How. 586, was an action on an attachment bond brought in the name of a former marshal of the United States, who was a citizen of the same state with the defendants, for the use and benefit of persons who were citizens of a different state from the defendants. The court sustained the jurisdiction, Mr. Justice McLean saying:

"The real plaintiffs were those named in the declaration for whose use the suit was brought, and who are averred to be citizens of New York" (14 How. 587).

In Blacklock vs. Small, 127 U. S. 96, the court sustained two objections to the jurisdiction. The first objection was upon the

ground that the action was by assignees of a chose in action, whose assignor could not have sued in the federal court. The second objection was upon the ground that although the plaintiffs were citizens of different states from the person who was sought to be held liable upon the bond, the recovery must necessarily inure to the benefit of another person who was equally interested with the plaintiffs in the recovery, but who was a citizen of the same state with the obligor. Mr. Justice Blatchford said:

"The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that, at the time of the commencement of the suit, she was and has since then always continued to be, a citizen of South Carolina, of which state Small was and is a citizen. The Circuit Court ought, therefore, to have dismissed the bill for want of jurisdiction" (127 U. S. 104, 105).

It has been uniformly held that the citizenship of a next friend is not the test of jurisdiction in the federal courts. Blumenthal vs. Craig, 55 U. S. App. 8; 81 Fed. 320; Woolridge vs. McKenna, 8 Fed. 650, 668; Voss vs. Neineber, 68 Fed. 947; Williams vs. Ritchey, 3 Dil. 406 (Fed. cas. No. 17734).

IV.

The Administrator's Appointment is Void.

The petition alleges that the plaintiff "was *duly* appointed and qualified by the Circuit Court of Fayette county, Indiana, as the administrator of the estate of Chris. Sweetman, deceased" (Rec. 1, 2). This allegation is denied by the answer (Rec. 4). The court held that the plaintiff's appointment could not be attacked collaterally, and excluded evidence tending to show that the appointment was void (Rec. 11).

The jurisdiction of the Circuit Court of Indiana to appoint an administrator is strictly statutory. Jefferson Railroad vs. Swayne, 26 Indiana, 477, 483; Croxton vs. Renner, 103 Indiana, 223.

The statute is as follows (Burns' Revision of 1894, Sec. 2381):

"Such letters shall be granted in the county—

First. Where, at his death, the intestate was an inhabitant.

Second. Where, not being an inhabitant of this state, he leaves assets.

Third. Where, not being an inhabitant and dying out of the state, he leaves assets.

Fourth. Where, not being an inhabitant, he dies out of the state, not leaving assets in any county thereof, but assets of such intestate shall afterward come into it.

Fifth. But where, not being an inhabitant, he shall die out of the state, leaving assets in several counties, or assets of such intestate shall, after his death, come into several counties, letters may be granted in any one of the counties in which such assets may be at the time of his death, or into which they come thereafter; and the administration first lawfully granted shall extend to all the estate of the intestate, and exclude the jurisdiction of administration in the same estate in all other counties."

It is admitted "that the deceased at the time of his death was, and prior thereto had been, a resident and citizen of the state of Ohio" (Rec. 10). The only jurisdiction therefore to appoint an administrator in Indiana was upon the ground that Sweetman, "not being an inhabitant of Indiana" had "left assets" in Fayette

county. This is not the ground upon which administration was granted. The letters themselves describe Sweetman as "late of Fayette county," and show that the appointment was made on that ground (Rec. 12). The application does not state that Sweetman left assets *in Fayette county*, nor that he was *not* an inhabitant of Indiana (Rec. 14).

In Jefferson Railroad vs. Swayne, 26 Indiana, 477, it was held that a claim for wrongful death is not assets within the meaning of this statute, and that an appointment based thereon is null and void. Elliott, J., after quoting the statute said:

"The jurisdiction of the court over the subject is derived from these provisions of the statute, and can only be exercised under the circumstances and in the cases provided for thereby; and where the intestate is not an inhabitant of this state at the time of his death, and leaves no assets in the state, and none came into it afterward, no jurisdiction is conferred on the court, in any county of the state, to grant letters of administration on the estate of such intestate, *and the grant of letters under such circumstances is coram non judice and void*, see authorities supra, and also Longworthy vs. Baker, 23 Ill. 484; McChord vs. Fisher's Heirs, 13 Ben Mon. 193; Flinn vs. Chase, 4 Denio, 85.

This presents for our determination the question, is the claim for damages against the railroad company for causing the death of Swayne, assets of his or of his estate within the meaning of the statute? The term "assets," as used in the third and fourth clauses of the section of the statute last cited, evidently means assets of the intestate, that is, property rights, or choses in action held by, or belonging to, the intestate at the time of his death, and which, as a part of his estate, his admistrators, as his legal representative, is entitled to in the due administration of the estate, for the payment of debts. See Bouvier's Law Dic., title, "assets;" Toller on Exrs., 137; William on Exrs., 1496.

The right of action referred to against the appellant, for causing the death of Swayne, did not exist at common law, but it is based upon section 784, of the Code, which provides that, "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury

for the same act or omission. The action must be commenced within two years. The damages can not exceed $5,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." That a cause of action for an injury to the person dies with the party injured, and does not survive to his personal representative, is a maxim of the common law, too familiar and long established to require the citation of authority to support it. The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it *creates a new cause of action*, unknown to the common law.

The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which died with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and if no such person existed, it could not be maintained. The Indianapolis, etc., R. R. Co. vs. Keeley's Adm'r, 23 Ind. 133; Lucas vs. The New York, etc., R. R. Co., 21 Barb. 245; The Chicago, etc., R. R. Co., vs. Morris, 26 Ill., 400; The State vs. Gilmore; 4 Foster, 461; Lyons' Admr., vs. Cleveland, etc., R. R. Co., 7 Ohio St., 336; The Commonwealth vs. The Eastern R. R. Co., 5 Gray, 473;

In Whitford vs. The Panama R. R. Co., 23 N. Y. 465, it was held, under a statute substantially the same as ours, that the compensation for the bodily injury remains extinct, but a new grievance, of a distinct nature, namely, "the deprivation suffered by the wife and children, or other relatives, of their natural support and protection, arises upon his death, and is made by the statute the subject of a new cause of action in favor of these surviving relatives, but to be prosecuted, in point of form, by

the executor or administrator." It was also held that the reference in the statute of that state, of which ours, in that particular, is a copy, "to the ability of the deceased to maintain the action if death had not ensued, is inserted solely for the purpose of defining the kind and degree of delinquency with which the defendant must be chargeable, in order to subject him to the action. The act, neglect or default must be such as would, if death had not ensued, have entitled the party injured to maintain an action," see also Woodward vs. Michigan, etc., R. R. Co., 10 Ohio St., 121.

The amount of damages to be recovered in such a suit is limited, both by the statutes of New York and of this state, to $5,000, but there is a difference in the language of the two statutes in this respect. The New York statute declares "the sum recovered to be for the exclusive benefit of the widow and next of kin," and that, "the jury may give such damages as they shall deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person," while the statute of this state, as we have seen, provides that "the damages can not exceed $5,000, and must inure to the exclusive benefit of the widow and children, or next of kin." This however is but a difference in form and not in substance. Our statute creates a new cause of action for the exclusive benefit of the widow, and children, or next of kin, not for the injury to the deceased, for which, had he lived, he might have sustained an action, but for causing his death, and thereby depriving those entitled thereto of his society and support, and it follows, as a legal consequence, that the damages assessed must be based on the injuries resulting from such death to the wife and children, or next of kin, for whose benefit the right of action is given."

In Perry, Administrator, vs. The St. Joseph & Western Railroad Co., 29 Kan. 420, which was an action for wrongful death, it was held that the claim sued for was not assets upon which administration could be founded, and that the invalidity of administration based solely thereon was a defense to the action. Horton, C. J., said:

"If the deceased was not an inhabitant or resident of this state at the time of her death, and if she left no estate to be ad-

ministered within this state, and none came into it afterward, then the Probate Court of Doniphan county had no jurisdiction to issue letters of administration on the estate of the deceased, or to appoint the plaintiff her administrator, *and all its acts in doing so are void in toto.* It has been decided in many cases that administration granted on the estate of a person not really dead is totally void (Stephenson vs. Superior Court, 15 Reporter, p. 140; Griffith vs. Frazier, 8 Cranch, 23; Williams on Exec. [Am.. notes by Perkins], 632 and notes to p. 631). The jurisdiction of the Probate Court of Doniphan county to issue letters of administration is derived from the provisions of the statute, and can be only exercised under the circumstances and in the cases provided for thereby, therefore if the deceased, not being an inhabitant or resident of this state at the time of her death, left no estate to be administered within this state, and none comes into it afterward, that court under the statute has no jurisdiction to grant administration. But it is said that the Probate Court had jurisdiction to ascertain whether, as a fact, the deceased left any estate in Kansas, and its judgment granting letters of administration is conclusive until revoked or reversed. Where the jurisdiction of a court is conceded, as a rule its judgment is conclusive of all matters involved; but if the jurisdiction be disproved then the judgment is void for all purposes (Mastin vs. Gray, 19 Kas. 458, and the cases there cited; Melia vs. Simmons, 45 Wis. 334; Moore vs. Smith, 11 Rich [S. C.] Law. 569).

Now the Probate Court of Doniphan county had no authority to grant letters of administration unless the deceased left an estate in that county, and it will not do to say that the finding of that fact by the court is conclusive of its own jurisdiction, for this would be, to use a common expression, "reasoning within a circle." The Probate Court of that county we suppose assumed that the deceased had left an estate to be administered and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective than if the Probate Court of Doniphan county had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the Probate Court rests upon the fact of an estate belonging to the deceased in Kansas, if the defendant can

clearly show that the deceased died without leaving any estate of any kind, it must result that *the entire proceedings before the Probate Court were without jurisdiction, and void* (D'Arusmart vs. Jones, 11 Cent. L. J. 253; Thompson vs. Whitman, 18 Wall. 457; Jochemsen vs. Bank, 3 Allen, 87.)"

To the same effect is Paul vs. Willis, 69 Tex. 261, 266; 7 S. W. 357, 359, where it was held that a bona fide purchaser at a sale under the void administration is not protected.

In Thumb vs. Gresham, 2 Metc. (Ky.) 306, the court held:

"A county court in this state has no jurisdiction to grant administration on the estate of a person who died domiciled in another state, where there is no personal estate here to be administered; and every such grant is void, and confers no power or authority on the person appointed as administrator."

In Holyoke vs. Haskins, 5 Pick. 20; s. c. 9 Pick. 259, it was held that letters of administration granted by the judge of probate of Suffolk county, on the estate of a resident of the county of Middlesex, were absolutely null and void, even after twenty years, and as against a purchaser in good faith of real estate sold by the administrator on license.

In Griffith vs. Frazier, 8 Cranch, 9, 24, the opinion being delivered by Chief Justice Marshall, it was held that the appointment of an administrator during the temporary absence from the state of the executor theretofore appointed, was null and void, and subject to collateral attack.

In Scott vs. McNeal, 154 U. S. 34, it was held that the appointment of an administrator of a person not in fact dead was absolutely null and void, and subject to collateral attack.

The watch, chain, rings and other personal effects on Sweetman's person at the time of his accidental killing in Indiana, he being at the time a resident and citizen of Ohio, temporarily in Indiana, are not "assets" "left" by him in Fayette county, within the meaning of the statute. These trinkets may have been carried back from Ohio to Fayette county, Indiana, at the time of the application for administration, in which event they would

clearly not be assets on which an administration in Indiana could be founded, but inquiry on this point was cut off by the Circuit Court on the ground that the record was conclusive and could not be attacked (Rec. 11). The ruling out of this testimony is perhaps immaterial, because it appears from the letters themselves that administration was granted, upon the supposition that Sweetman had died an inhabitant of Indiana; and since it is admitted that no such ground for the assumption of jurisdiction by the Fayette Circuit Court in fact existed, the plaintiff's appointment is absolutely null and void.

V.

The Plaintiff having been Appointed Administrator in Indiana alone, can not maintain this action in Ohio.

The defect appears upon the face of the petition. In Duchesse D'Auxy vs. Porter, 41 Fed. 68, it was held that

"A complaint by an administratrix, showing her appointment in another state, but averring none in the state in which the federal court in which suit is brought is sitting, is demurrable."

To the same effect is Noonan vs. Bradley, 9 Wall. 394, 403, where Field, J., said:

"But, in the case at bar, had there been no other plea than the third plea, which goes to the merits, the character of the plaintiff, as administrator in Wisconsin, would not have been admitted, for the reason that the declaration states that the grant of administration to him was by letters issued in the state of New York, and the plea to the merits only admits the title as stated in the declaration. The effect of a plea to the merits was decided as long ago as the time of Lord Holt, in the case of Adams vs. The Tertennants of Savage (6 Modern, 134). In that case the plaintiff brought a *scire facias* against the defendants, reciting a judgment recovered by his intestate against Savage, and that administration was committed to him by the Archdeacon of Dorset, whose jurisdiction did not extend to the place where the judgment was rendered. The tertennants traversed the seisin of Savage, and the finding being against them, motion in arrest of judg-

ment was made, on the ground that the administration committed to the plaintiff was void. It was urged for the judgment, that though the plaintiff had shown a bad title, the defendants not traversing it, or taking advantage of the invalidity of the administration, but pleading to the merits, admitted that the plaintiff was entitled to sue, and should not be permitted, when the right was tried against them, to controvert what they had declined to insist upon; but Chief Justice Holt said: 'If the plaintiff had not set forth what kind of administration he claimed by, but only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put you upon showing it by craving oyer of the letters of administration as he might have done, but pleaded over; that had been an admission of the plaintiff's having a right of suing as administrator as he had alleged.' And after stating that the plaintiff made title to himself by an administration which was invalid, the Chief Justice continued: 'And when you yourself affirm this to be your title, how can we intend you to have another; for of your own showing this is your title, which is manifestly bad? And there is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that, for then it may be well presumed if the party were not well satisfied of plaintiff's title he would have insisted on it in due time, and where the plaintiff himself shows he has no title, for then the court has no room for intendment.' The authority of this case has not, so far as we are aware, ever been doubted, and were there no other ground against the position of the plaintiff, it would be decisive."

See also Insurance Co. vs. Lewis, 97 U. S. 682, 686.

In Johnson vs. Powers, 139 U. S. 156, which was a bill in equity filed in the Circuit Court of the United States for the Northern District of New York by an administrator appointed in Michigan, Mr. Justice Gray said:

"The plaintiff certainly can not maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that state, and can not authorize him to maintain any suit in the courts, either state or national, held in any other state.

Stacy vs. Thrasher, 6 How. 44, 58; Noonan vs. Bradley, 9 Wall. 394."

In New England Mutual Life Insurance Co. vs. Woodworth, Admr., 111 U. S. 138, 146, Mr. Justice Blatchford said:

"Administration in Massachusetts or in Michigan would not suffice as a basis for a suit in Illinois."

Story (Conflict of Laws, Sec. 513) thus states the rule almost in the language used by him in Vaughan vs. Northup, 15 Pet. 1, 6:

"It has * * * become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator (or other foreign personal representative) in his official capacity, in the courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him."

The difficulty is not removed by Rev. Stat. Ohio, Secs. 6133, 6134a, 6135.

Section 6133 passed March 23, 1840 (38 Ohio Laws, 147, 187), is a section of "An act to provide for the settlement of the estates of deceased persons." It applies, according to its express terms, only to suits brought by a foreign executor or administrator "in his capacity of executor or administrator;" that is, to recover assets which have descended to him as administrator. It does not relate to suits brought by an administrator as a nominal party for the use and benefit of others, to enforce a cause of action which does not belong to the estate, and which does not vest in the administrator in "his capacity of administrator."

Section 6134a provides that a right of action for wrongful death given by a statute of a foreign state may be enforced in this state under certain circumstances. It was passed as an amendment of the Ohio Statute, in view of the decisions in Woodard vs. Michigan Southern, etc., Railway Company, 10 Ohio St. 121, and in Hover, Administrator, vs. Pennsylvania Company, 25 Ohio St. 667, to the effect that the Ohio Statute did "not extend to cases where the wrongful act which caused the

death was committed outside the state of Ohio." But Sec. 6134a does not provide that the action shall be brought by a *foreign* administrator, and clearly does not contemplate an action in that form in cases where, as at bar, the deceased was, and his widow and children are residents of Ohio.

The action at bar might have been maintained in the Circuit Court of the United States for the district of Ohio, without the aid of Sec. 6134a. Dennick vs. Railroad Company, 103 U.S. 11; Texas & Pacific Railway Company vs. Cox, 145 U. S. 593, 605. That section added nothing to the jurisdiction of the court below. But in Dennick vs. Railroad Company, 103 U. S. 11, which was an action brought in the Circuit Court of the United States for the Northern district of New York for a wrongful death in New Jersey, the plaintiff was an administrator appointed in New York. Mr. Justice Miller said:

"Let it be remembered that this is not a case of an administrator, appointed in one state, suing in that character in the courts of another state, without any authority from the latter. It is the general rule that this can not be done. The suit here was brought by the administratrix in a court of the state which had appointed her, and of course no such objection could be made" (103 U. S. 19).

In Bruce's Admr. vs. Cincinnati Railroad Co., 83 Ky., 174, 181, it was held that an administrator appointed in Kentucky might maintain an action in the courts of that state for a wrongful death occurring in Tennessee, the court saying that a personal representative appointed in Tennessee "could not in virtue of such appointment alone, maintain the action here."

The point that sections 6133, 6134a, 6135, Rev. Stat. Ohio, do not entitle the plaintiff, as *foreign* administrator, to maintain this action in Ohio seems to be covered by the decision of this court in Maysvillle Street Railroad & Transfer Company vs. Marvin, 16 U. S. App. 236; 59 Fed. 91, where it was held (1) that a statute of Kentucky, which is part of the General Administration Act of that state, and the substantial equivalent of sec. 6133 Rev. Stat. Ohio, does not confer upon a foreign administrator

capacity to sue in Kentucky *for wrongful death*, and (2) that another statute of Kentucky giving the "personal representative" a right of action for wrongful death, and which is otherwise the substantial equivalent of sec. 6135 Rev. Stat. Ohio, was not to be construed as conferring such right upon a *foreign* administrator.

Section 6134a is made a part of the statute of which section 6135, providing that "*every such action* * * * shall be brought in the name of the personal representative of the deceased," is the following section. The direction of sec. 6135 as to the name in which the action shall be brought is general, applying to all actions, whether for death occurring in the state or out of the state. That section can not therefore be construed as conferring any special rights upon *foreign* administrators, as such. Whether they may sue in the courts of Ohio is left to be determined by general rules of law, and those rules, as this court has decided and as the Supreme Court has repeatedly held, forbid such an action.

It was not necessary to procure the appointment of an administrator in Indiana for the purposes of suit either in that state or in Ohio. The Supreme Court of Indiana has held that the action may be maintained in the courts of that state by a foreign administrator. Railroad Co. vs. Hendricks, 41 Ind. 48; Memphis & C. Packet Co. vs. Pikey, 142 Ind. 304. Indeed an action is now pending in the Circuit Court of Fayette county, Indiana, against the plaintiff in error for this very cause of action, brought by Mary K. Sweetman, as administrator, appointed by the Probate Court of Montgomery county, Ohio.

We respectfully submit that the judgment of the Circuit Court should be reversed.

LAWRENCE MAXWELL, JR.,
Counsel for the Plaintiff in Error.

WM. K. MAXWELL,
WM. W. RAMSEY,
Of Counsel.

STATUTE OF INDIANA.

AN ACT regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state. *Provided further*, That its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Laws of Indiana, 1893, p. 294, Revised Statutes of Indiana, 1894 (Burns) sections 7083-7087.) [Approved March 4, 1893.]

[7083] 1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place,

and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

[7084] 2. Neither an employe nor his legal representative shall be entitled under this act, to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employe to palpable danger, nor where the injury was caused by the incompetency of the co-employe, and such incompetency was known to the employe injured; or such injured employe, in the exercise of reasonable care might have discovered such incompetency; unless the employe so injured gave or caused to be given information thereof to the corporation or to some superior entrusted with the general superintendence of such co-employe, and such corporation failed or refused to discharge such incompetent employe within a reasonable time, or failed or refused within a reasonable time, to investigate the alleged incompetency of the co-employe or superior, and discharge him if found incompetent.

[7085] 3. The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: Provided, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

[7086] 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

[7087] 5. All contracts made by railroads or other corporations

with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act however shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

English Employers' Liability Act of 1880, 43 and 44 Vict. Ch. 42.

An act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service. (7th September, 1880).

Be it enacted by, etc., etc., as follows:

1. Where, after the commencement of this act, personal injury is caused to a workman—

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the négligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine or train upon a railway, ... the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled, under this act, to any

right of compensation or remedy against the employer in any of the following cases; that is to say

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of an Act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer of such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

(Limitation of time for bringing suit, etc.)

Supreme Court of the United States

OCTOBER TERM, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,

Plaintiff in Error,

No. 271. *vs.*

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Motion to Dismiss or Affirm.

Now comes defendant in error and moves the Court to dismiss the writ of error in the above entitled cause.

1. On the ground that the writ of error from this Court in this case was taken to the Circuit Court while the case was pending in the Circuit Court of Appeals for the Sixth Circuit on a writ of error theretofore sued out by the plaintiff in error to said Circuit Court, and the judiciary act of March 3, 1891, c. 517 (26 Stat., 826), does not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts; and

2. On the ground that this Court is without jurisdiction in this case, for that the appellate jurisdiction of this Court is sought

to be maintained upon the single ground that the statute of Indiana under which the recovery was had in the Circuit Court is in violation of the Fourteenth Amendment of the Constitution of the United States, and that, therefore, the case is one in which it is claimed that the statute of a state is in contravention of the Constitution of the United States within the meaning of the judiciary act of March 3, 1891, c. 517, Sec. 5 (26 Stat., 826). But the record does not show that any such claim was made or such constitutional question was raised or decided at the trial of the case in said Circuit Court, or that any construction or application of the Constitution of the United States was expressed by the Circuit Court or asked for at the trial by defendant, or that any constitutional question was passed upon, dealt with or in any manner presented to said Circuit Court.

And defendant in error further moves the Court (and unites such motion with the foregoing motion to dismiss) to affirm the judgment of the Circuit Court herein on the ground that, although the record may show that this Court has jurisdiction, yet it is manifest from the record that the writ of error in this case was taken by plaintiff in error for delay only.

CHARLES M. CIST,
HARLAN CLEVELAND,
Attorney for Defendant in Error.

No. 271.

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Brief of Cist & Cleveland for D

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Feb. 26, 1900.

No. 271.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
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Defendant in Error.

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Brief in Support of Motion to Dismiss or Affirm.

CHARLES M. CIST,
HARLAN CLEVELAND,
Attorneys for Defendant in Error.

EDGAR W. CIST,
Of Counsel.

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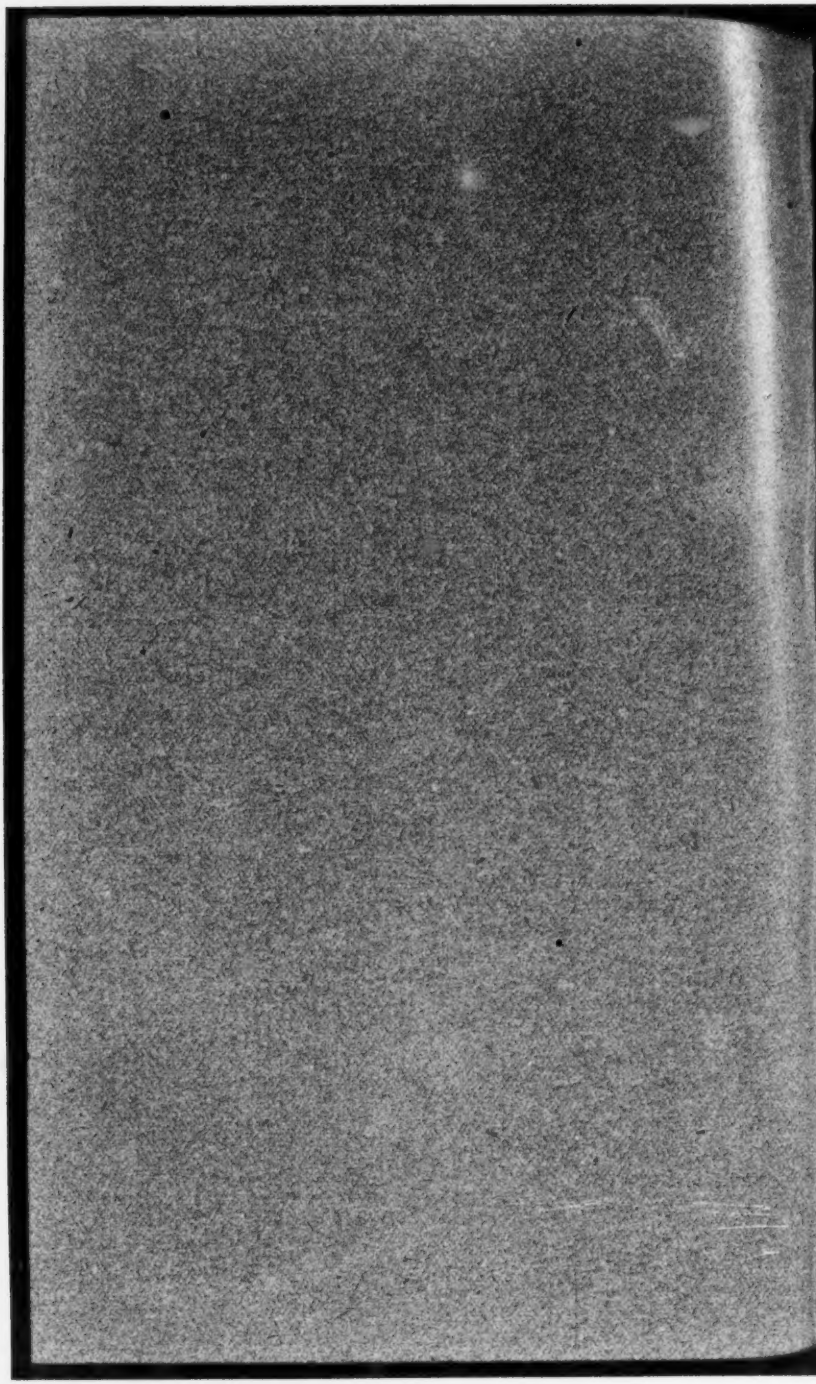

Supreme Court of the United States

OCTOBER TERM, 1899.

THE CINCINNATI, HAMILTON & DAYTON RAILROAD COMPANY,
Plaintiff in Error,

No. 271. *vs.*

BENJAMIN F. THIEBAUD, Administrator of Chris. Sweetman, Deceased,
Defendant in Error.

Brief for Defendant in Error in Support of the Motion to Dismiss or Affirm.

STATEMENT.

This case comes into this Court on writ of error to the Circuit Court of the United States for the Southern District of Ohio.

The action was for wrongful death. Decedent was a locomotive engineer drawing defendant's pay train. He was killed September 18, 1896, near Connersville, Indiana, in a collision of the pay train with one of defendant's freight trains, caused by the negligence of the conductor and engineer in charge of the freight train and engine drawing same.

Plaintiff relied for recovery (Rec., p. 8) upon a statute of Indiana (Rev. Stat., Secs. 7083–7087) known as the "Employers Liability Act," which we print in full as an appendix hereto.

The bill of exceptions does not purport to contain all the evidence offered at the trial nor the charge of the Court to the jury thereon. It is therefore improper to attempt to state the facts

of the accident as shown by the testimony and proof at the trial, upon which the Court predicated its charge.

The Court charged the jury (Rec., p. 8), "among other things," that the defendant was not liable for negligence of the conductor and engineer of the freight train at common law, but that such liability was imposed by the said statute of Indiana, cited above, which plaintiff relied on to recover.

The jury rendered a verdict for plaintiff. A motion for new trial was overruled, and on August 30, 1898 (Rec., p. 14), a writ of error was sued out by the defendant from the Circuit Court of Appeals of the Sixth Circuit, where the case is now pending. Thereafter, on the 15th day of April, 1899 (Rec., p. 17), a second writ of error in the case was sued out from this Court upon which writ of error the case is before this Court on the motion to dismiss or affirm.

The Motion to Dismiss.

The motion to dismiss this case in this Court is based upon two grounds:

First. The writ of error from this Court was taken in this case while the case was pending in the Circuit Court of Appeals on writ of error from that Court. Plaintiff in error having elected to prosecute his writ of error in the Circuit Court of Appeals must abide by his election, and can not thereafter bring the same case into this Court by subsequent writ of error. Both the writs of error taken in this case undertake to bring up for review the whole case on the merits, the first to the Circuit Court of Appeals, the second to this Court.

In the case of *Columbus Construction Company* v. *Crane Company*, 174 U. S., 601, it was held that—

> "The judiciary act of March 3, 1891, c. 517, 26 Stat., 826, does not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate Courts, and therefore, the writ in this Court, which was taken while the case was pending in the Circuit Court of Appeals ought to be dismissed."

Second. The sole ground upon which plaintiff in error invokes the jurisdiction of this Court is that the act of Indiana, re-

ferred to above, is in contravention of the Constitution of the United States, to-wit, the Fourteenth Amendment thereof, and hence under Section 5 of the act of March 3, 1891, a writ of error may be taken from this Court direct to the Circuit Court.

This might be true, but for the fact that the record shows no such claim made in the case in the Circuit Court. The claim appears for the first time in defendant's assignment of errors.

To give this Court jurisdiction in such case it must appear from the record that the Circuit Court in some manner passed upon or decided the constitutional question. The record shows that no such question was raised, dealt with or passed upon by the Circuit Court. No such question having been raised at the trial, the defendant can not present to a reviewing Court an assignment of error upon a claim as to which the trial Court made no ruling.

In *Cornell* v. *Green*, 163 U. S., 75, the Court say:

"The appellate jurisdiction of this Court is sought to be maintained upon the single ground that the case 'involves the construction or application of the Constitution of the United States,' within the meaning of the judiciary act of March 3, 1891, c. 517, Sec. 5 (26 Stat., 828).

"But in order to bring a case within this clause of the act, the Circuit Court must have construed the Constitution or applied it to the case, or must at least have been requested, and have declined or omitted, to construe or apply it. *No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.* . . . .

"In a case decided at this term it was said by the Chief Justice, in delivering judgment:

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. *An assignment of errors can not be availed of to import questions into a cause which the record does not show were raised in the Court below, and rulings asked thereon, so*

as to give jurisdiction to this Court under the fifth section of the act of March 3, 1891. (*Ansbro* v. *U. S.*, 159 U. S , 695, 697, 698).

"In support of that judgment several cases were cited, two of them very like the case at bar: *Carey* v. *R. R Co.*, 150 U. S., 170, 181; In re Lennon, 150 U. S., 393, 401."

If this were not the rule, then the defeated party in any case in the Circuit Court in which the recovery was based upon a statute of a state might, at his option, take the case to the Supreme Court, or to the Circuit Court of Appeals, by making or omitting to make in his assignment of errors a claim that the statute was in contravention of the Constitution of the United States. We submit this is not the law, that a party must determine at the trial on what issues he will submit his case and can not assert in the appellate court claims which he waived or omitted to urge at the trial.

The Motion to Affirm.

If, however, the Court should consider that the motion to dismiss ought not to be granted, and that although the record shows that this Court has jurisdiction, yet that there was color for the motion to dismiss and should proceed to the consideration of the case, we respectfully submit in support of the motion to affirm the following examination and discussion of the assignments of error and the claims thereunder made in the case by counsel for plaintiff in error.

ARGUMENT.

I.

The first assignment of error is:

"That the Court erred in charging the jury that the defendant was liable under the act of Indiana, March 4, 1893."

This assignment ought not to be considered for the reason that the bill of exceptions does not purport to contain all the evidence in the case.

The charge of the Court complained of in the assignment of error is equivalent to a peremptory instruction to find for the plaintiff. In the absence of a bill of exceptions showing all the

evidence it is to be presumed that there was evidence justifying the charge.

In *Ry. Co.* v. *Cox*, 145 U. S., 593, the Court held:

"The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the Court should have directed a verdict for defendant for want of that which may have existed."

In *Lincoln Savings Bank* v. *Allen*, 82 Fed., 149, the Court say:

"This printed record does not contain all the evidence that was presented to the Court below. . . . . After a trial Court has submitted a case to the jury, the burden of proof to show that there was no evidence to warrant that course is on him who asserts it. If he would maintain his claim, he must present all the evidence to the appellate court, in order that that Court may see for itself what the evidence was. If he fails to do so, he can not prevail upon that issue. *Railway Co.* v. *Washington*, 49 Fed., 347, 350, 353; *Railway Co.* v. *Harris*, 63 Fed., 800, 805; *U. S.* v. *Patrick*, 73 Fed., 800, 806."

And on page 153:

"The presumption is that the evidence before the Court below warranted this charge, and we can not review it in the absence of a certificate that all the evidence upon these questions is before us."

See also: *Assn.* v. *Robinson*, 74 Fed., 10.
Taylor Craig v. *Hage*, 69 Fed., 581.
Ry. Co. v. *Lorentzen*, 79 Fed., 291.
U. S. v. *Patrick*, 73 Fed., 800.
Ry. Co. v. *Harris*, 63 Fed., 800.
Ry. Co. v. *Washington*, 49 Fed., 347.
Honey v. *Ry. Co.*, 82 Fed., 273.
Crawford v. *Foster*, 83 Fed., 975.
Lumber Co. v. *Stump*, 86 Fed., 584.
R. R. Co. v. *Ives*, 144 U. S., 408.
Carroll v. *Peake*, 1 Pet., 18.

The justice and propriety of this rule is well shown in the case at bar. We understand the claim of counsel under this and the third assignment of error to be that the case made out by the plaintiff below was not within the provisions of the act of Indiana. In the absence of a bill of exceptions showing all the evidence it can not be presumed but that all the facts necessary to bring the

case within the provisions of any one of the sections of the act were proved, so that the Court was authorized to instruct the jury that the defendant was liable under that act. On the contrary, it is to be presumed that at the trial there *was* evidence to support the charge, especially as the record does show (Rec., p. 8) that the plaintiff "relied upon that act for recovery." Such proof received without objection on the part of defendant and followed by a verdict would operate to aid and cure any defect or uncertainty in the allegations of the petition, if any such existed, especially as defendant made no objection based on the allegations of the petition. *R. R. Co.* v. *O'Reilly*, 138 U. S., 334.

The petition contained a general charge of negligence on the part of the defendant, its servants, agents and employes, operating an engine of defendant, resulting in the death of plaintiff's intestate "while in the employ of defendant as an engineer running a locomotive engine of a train operated by defendant on its said railroad and while so engaged in the discharge of his duties." It was not necessary to set out or refer to the statute in the petition in the Circuit Court of the United States, for the Federal Courts take judicial notice of all general statutes of the several states.

If the defendant had desired a more particular statement of the cause of action with specifications of negligence complained of this could have been accomplished by a motion to make more definite and certain. The petition was good against demurrer and sufficiently stated that plaintiff's intestate was acting in the line of his duties.

In *Gulf, C. & S. F. R. Co.* v. *Washington*, 49 Fed., 349, the Court say :

"Indefiniteness or uncertainty of statements in a complaint which, when construed in the most liberal manner, states the substance of a cause of action, is not a ground of demurrer, but is a defect to be corrected by motion for a more specific statement. The complaint will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment. It is very well settled that a general allegation of negligence, without stating the particular acts which constituted the negligence, is good against a general demurrer. *Harper* v. *Railroad Co.*, 36 Fed. Rep., 102."

The case, however, even on the bill of exceptions as presented, is clearly within the provisions of Subdivisions III. and IV. of Section 1 of the Act.

The provisions of the Subdivision III. of Section 1. of said act, pertinent here, are :

"Where such injury resulted from the act or omission of any person done . . . . in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf."

Without waiving the point that the record does not show that all the evidence bringing the case within this subdivision is before this Court, we submit that the record does show that the injury resulted from the act of the engineer and crew done in obedience to the particular instructions given by the conductor as a person delegated with the authority of the corporation in that behalf. It appears (Rec., p. 9), that the injury resulted from the acts of the conductor of freight train No. 95, who ordered part of his train left on side track, and without leaving a flagman to signal approaching trains, went to the next side track, there deposited the cars, and then ran back with the engine to get the cars left on the first side track, and that this was negligence. It is manifest that unless the train crew and engineer had acted in obedience to the particular instructions of the conductor, who was the person delegated with the authority of the corporation in that behalf, these dangerous manœuvres could not have been performed. And it is also clear that the omission of the flagman to remain and guard the switch was in obedience to the conductor, for the record shows (p. 9) that the "*conductor* failed to leave a flagman." He was therefore directly responsible for the omission of the flagman to be at his post, where he could signal approaching trains.

The case is also within Subdivision IV. of Section 1 of said act, the provisions of which are as follows :

"Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, *locomotive engine or train upon a railway*, or where such injury was caused by the negligence of any person, co-employe or fellow

servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The record shows (Rec., p. 9) that deceased was killed by the negligence of the engineer and conductor of the freight train, to-wit, "persons having charge of a locomotive engine and a train upon a railway."

It is contended by counsel that this applies only to "persons injured who are obeying and conforming to the order of some superior at the time of such injury, having authority to direct."

The allegation of the petition was that the decedent was killed in Indiana while "in the employ of the defendant as an engineer running a locomotive engine of a train operated by defendant on its said railroad between Indianapolis, Indiana, and Hamilton, Ohio, and while so engaged in the discharge of his duties upon said engine and without fault on his part." These are allegations not only implying, but in every respect inconsistent with any other theory than that decedent was obeying the orders of some superior having authority to direct him. It is common knowledge that an engineer running a locomotive in the discharge of his duties while employed by a railroad company must be obeying and is acting under orders of his superior, either the train dispatcher, superintendent or some other officer.

Under this allegation it appeared that (Rec., p. 9), "the deceased had the right to be with his train at the place where and at the time when he was, and was guilty of no negligence." And we again invoke the rule, that unless the bill of exceptions, which counsel saw fit to present, is shown by the record to contain all the evidence adduced at the trial, this Court will not consider whether or not the facts which the Court below permitted to be proved at the trial under the allegations in the petition were sufficient to bring the case within the statute. There is nothing in the record to show that there was not introduced in evidence the special orders of the train dispatcher under which decedent

was running his engine and the rules of the company requiring decedent to obey such orders and counsel has no right, having elected to take a partial bill of exceptions only, to ask that this Court assume that no evidence was offered on this point.

But we deny that the act should be so construed and we deny that such construction has been put upon it by the Supreme Court of Indiana.

In the case of *Ry. Co.* v. *Little's Admx.*, 149 Ind., 167, the Court, (p. 170), deals with the third and fourth subdivisions of Section 1 of the Act and separates the specifications of exemption from the fellow servant rule, as follows:

"The third and fourth subdivisions of Section 1 of the Act of March 4, 1893 (Acts, 1893, p. 294; Rev. St., 1894, Sec. 7083), are as follows, our figures separating them into specifications of exemption from the fellow servant rule: (1) 'Third. Where such injury resulted from the act of omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or' (2) 'in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.' (3) 'Fourth. *Where such injury was caused by the negligence of any person, in the service of such corporation, who has charge of any* signal, telegraph office, switch yard, shop, roundhouse, *locomotive engine or train upon a railway*, or' (4) 'where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service, in any of the several departments of service of any such corporation, the said person, co-employe or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior, at the time of such injury having authority to direct; but nothing herein contained shall be construed to abridge the liability of the corporation under existing law.'"

Inasmuch as the injury was caused by the negligence of the engineer and conductor of the freight train, the case comes precisely within the language of that part of the act which the Supreme Court of Indiana separate as specification 3 in the above quotation, *aud the Court does not, in separating the language, attach to it the qualification contended for by counsel* that "the person injured must be obeying or conforming to the order of some superior, at the time of such injury, having authority to direct."

The precise point, however, was decided in *Ry. Co.* v. *Montgomery*, 152 Ind., 1, adversely to the contention of plaintiff in error. The Court held on a demurrer to the complaint that the words "obeying or conforming to the order of some superior at the time of such injury" were merely equivalent to the words "acting in the line of duty as an employe of the defendant."

The Court say, construing this subdivision:

> "It is only required to state that the engineer, while in the service of appellant in charge of a locomotive engine, negligently injured the appellee, both being at the time acting in the line of duty as employes of the appellant."

The allegations of the petition in the case at bar are in equivalent language, and the proof in the case, as well as counsel's solemn admissions at the trial, evidenced the fact that decedent was "at the time acting in the line of duty as an employe of defendant and was conforming to the orders of his superior."

It should perhaps also be said that the pleadings in the case at bar are not necessarily to be judged by the Indiana rules or Indiana code, as the action was brought and tried in Ohio.

II.

The Act is Constitutional.

The claims of plaintiff in error under the second and fourth assignments of error are that the statute of Indiana contravenes the Fourteenth Amendment of the Constitution of the United States and also the Constitution of Indiana.

We have already called attention to the fact that the record shows no such claim made or passed upon by the trial Court, and have submitted authorities indicating that this Court will not consider such question on review unless it appears that it was presented at the trial.

The question whether or not the act contravenes the Constitution of the state of Indiana has been before the highest Court of that state and the validity of the statute upheld. *Ry. Co.* v. *Montgomery*, 152 Ind., 1. This Court has held in numerous cases that such decision is binding upon the Federal courts. *Fallbrook*

Irrigation Dist. v. *Bradley*, 164 U. S., 112; *Oakes* v. *Mase*, 165 U. S., 363; *Forsyth* v. *Hammond*, 166 U. S., 506; *Bank* v. *Pennsylvania*, 167 U. S., 461.

The objections made by counsel for plaintiff in error that the statute contravenes the Fourteenth Amendment to the Constitution of the United States are:

1. That the classification attempted to be made by it is based not on the character of employment, but on the character of the employers.

The answer to this objection is that the Supreme Court of Indiana in the case of *Ry Co.* v. *Montgomery*, 152 Ind., 1, has passed upon this question and held, construing this statute, that the classification intended by the statute was based on the character of the occupation or employment. This judicial interpretation by the highest Court of the state becomes by the familiar rule a part of the statute itself and equally binding upon the Federal court. If the statute as administered by the courts of Indiana adopts the classification based upon employment, then that becomes the character of the statute whose constitutionality this Court is asked to try, and the statement of counsel that the statute adopts some other or different classification is without foundation.

2. That even if such classification can not be assumed to have been the intent of the Legislature, yet the act can not be sustained as an act applying to railroad corporations alone, and two reasons are alleged.

First. That the act discriminates between railroad corporations and individuals or copartnerships operating a railroad.

This point was disposed of by the Supreme Court in *Railway Co.* v. *Mackey*, 127 U. S., 205, in which case the Court say:

> "The hazardous character of the business of operating a railroad would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public."

Second. That to so limit the operation of the act is not to give effect to what appears to have been the intent of the Legislature.

This is also answered by the decision on this point by the Supreme Court of Indiana in the case of *Ry. Co.* v. *Montgomery*, 152 Ind., 1, where the Court held that the act was applicable to railroad corporations and constitutional as to such corporations without reference to its application to other corporations or the validity of its provisions when attempted to be applied to such other corporations.

On a question of construction, or of giving effect to the legislative intent, the decision of the Court of last resort construing a statute of its own state will be followed by the Federal courts. *Noble* v. *Mitchell*, 164 U. S., 367.

III.

The Circuit Court Had Jurisdiction.

The right asserted in this case arose under the Statute of Indiana. The liability imposed upon the defendant is fixed and controlled by the laws of that state. The person who can maintain the action must be discovered by an examination of the provisions of the Indiana law.

Dennick v. *R. R. Co.*, 103 U. S., 11–17, 18.
I. C. R. Co. v. *Ihlenberg*, 75 Fed. Rep., 873, 879.
B. & M. R. Co. v. *McDuffey*, 79 Fed. Rep., 934, 936.

It is, therefore, immaterial in this case, what right would have arisen or what liability would have been imposed had this accident, resulting in death, happened in Ohio, or Maryland, or in the District of Columbia, or Nebraska, or in whom the right of action in either of such events would have been vested, or who would have been the real or who the nominal parties to the record under statutes in the one or the other of those jurisdictions. Only so far as those statutes resemble the Indiana statute can decisions construing them bear upon the interpretation of the latter.

The Indiana Statute is as follows :

" When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the lat-

ter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Burns, Rev. Statutes, 1894. Sec. 285. (284).

Under this section of statute it has been held in Indiana that the fund, when recovered, is held by the personal representative, whether domestic or foreign, as the *trustee of an express trust* to inure to the benefit of the widow and children, if any, and if not, to the next of kin.

Memphis & Cincinnati Packet Co. v. *Pikey, Admx.*, 142 Ind., 304, 311.

Citing,

Jeffersonville, etc., R. R. Co. v. *Hendricks, Admr.*, 41 Ind., 48.

Dennick v. *R. R. Co.*, 103 U. S., 11.

In *Yelton, Administrator*, v. *Evansville & Indianapolis R. R. Co.*, 134 Indiana, page 414, it is said in reference to an action under this section, where the widow, being the sole beneficiary, had attempted to compromise the liability of the defendant railroad after suit had been commenced by the administrator, that—

"It must be prosecuted by the administrator. This being true, if the widow can compromise the cause of action and release the damages so as to terminate the suit, it places the administrator in the anomalous position of having the sole right to prosecute the action, and yet gives to the widow, or children, if there be children, the right to compromise the action outside of court, and cancel the claim for damages upon which the action is based. *While it would give to the administrator the sole right to prosecute the action, yet he would not have the sole right to control the prosecution of the action once commenced. It would seem that the law which authorized a person to prosecute an action, would give him, by necessary implication, the right to control such prosecution, and not permit one not a party to the action, and having no right to be a party to the action, the right to compromise the action. While actions under this section of the statute are prosecuted for the benefit of and the damages inure to the exclusive benefit of the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement.* . . . . The action is in favor of the personal representatives of the deceased, and the

widow has no power to control the prosecution of the action or interfere with its prosecution or make settlement of the cause of action. It is the damages in such action that inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"In Iowa there is a statute very much the same as the one in this state and is in effect the same. It provides that 'when a wrongful act produces death the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.'

"Section 3731, Iowa Rev. Statutes, 1888.

"In the case of *Dowell, Admr.*, v. *the Burlington, etc., Ry. Company*, 62 Iowa, 629, it is held that, in an action brought by the administrator to recover damages resulting from the death of the intestate, the widow of the deceased could not release the claim. The Court said:

"'She is not and was not the administratrix and could not release the claim of the estate of the intestate based upon his death through negligence of the defendant.'

"The action is the same in this state. *It is a right of action given to the personal representatives of the deceased*, the damages recovered to inure to the benefit of the persons named in the act.

"*It is a continuation in the personal representative, of the cause of action which would have existed for the negligence in favor of the deceased, if he had survived. Long* v. *Morrison*, 14 Ind., 595. The administrator would have the same right to control the action that the deceased would have had, had he survived and prosecuted it. *Rodgers, Admr.*, v. *Zook*, 86 Ind., 237. The administrator of the estate could not make a compromise and settlement of the action, except by the authority of the Court. He had the right to prosecute the action to final judgment, and accept and collect the amount of damages assessed, but he had no right to compromise and adjust the claims without the order of the Court.

"*Markell's Admr.* v. *Spiller's Admr.*, 28 Ind., 488.

"2d Warner on Amer. Law of Administrators, p. 683, 11, Sec. 326."

In *Dennick* v. *R. R. Co.*, 103 U. S., 11, it is said, on page 20:

"Again: It is said that by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his life-time. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as

specific property devised to individuals, or the amount which by the legislation of most of the states is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator clothed with the apparent right to receive or recover by suit property or money may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin."

This relation of trustee, and the ability to prevent or determine the institution or prosecution of the action, or exercise full control over it when brought, are the elements which distinguish a right of action under the Indiana statute from one under the Maryland and similar statutes. There the action is by the terms of the statute brought in the name of some one for the use of others. Thus the principle stated in

McNutt v. *Bland*, 2 How., 9,
Maryland v. *Baldwin*, 112 U. S. 490,
Stewart v. *the B. & O. R. R. Co.*, 168 U. S., 445,
Huff v. *Hutchinson*, 14 How., 586,

and similar cases is inapplicable to the present case.

In such cases the real plaintiff is by a positive rule of law compelled to use the name of another who has not and never will have any real interest or control over the action. Under the Indiana statute the position of the administrator is just the reverse.

In *Coal Company* v. *Blatchford*, 11 Wall., 172, Mr. Justice Field refers to this distinction, and after commenting upon and explaining the cases of *Browne* v. *Strode*, 5 Cranch, 303, and *McNutt* v. *Bland*, 2 Howard, 9, where actions were brought on official bonds, in the names of Justices of the Peace for the use of an alien in the one case, and of the Governor of Mississippi for the use of a citizen of New York in the other, says, page 177:

"There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees and held nothing for the use or benefit of the real parties in interest. *They could not, as is said in McNutt* v. *Bland, prevent the institu-*

tion or prosecution of the actions or exercise any control over them. The Justices of the Peace in the one case and the Governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved."

This distinction was re-affirmed in *Knapp* v. *Railroad Company*, 20 Wall, p. 117, where the question was as to whether or not trustees under a mortgage were nominal parties or the real parties in interest. The Court says, p. 123:

"They are the real plaintiffs in any suit brought to enforce a claim accruing to them in the execution of their trust, as much so as executors and administrators are who also sue for the benefit of others and not themselves. *Like them they control the litigation and are charged with the responsibility of conducting it.* The true line of distinction between nominal and real parties to an action is pointed out by this Court in the recent case of *Coal Company* v. *Blatchford*. (Quoting as above).

"The position of Knapp as surviving plaintiff is very different. He is not a mere passive instrument in the litigation. On the contrary he is active in promoting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. *As the cause of action is vested in him, the Court looks to his citizenship in determining the question of jurisdiction, and not to the residence* of those persons who are beneficially interested in the subject matter of the litigation."

The statement in *New Orleans* v. *Gaines' Administrator*, 138 U. S., 595, on page 606, where the Court says:

"We have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespective of the citizenship of the persons whom they represent, such as executors, administrators, guardians, trustees, receivers, etc."

summarizes the result of the decisions of the Court beginning with

Chappedelaine v. *Dechenaux*, 4 Cranch, 306,

and followed in

Childress v. *Emory*, 8 Wheaton, 642,
Clark v. *Mathewson*, 12 Peters, 164, 171,
Bonnafee v. *Williams*, 3 How., 574,
Osborn v. *Bank*, 9 Wheaton, 738,
Irvine v. *Lowry*, 14 Peters, 298,
Rice v. *Houston*, 13 Wall., 66,
Davis v. *Gray*, 16 Wall., 220,
Florida v. *Anderson*, 91 U. S., 676,
Walden v. *Skinner*, 101 U. S., 589,

and of numerous Circuit Courts, such as

Davies v. *Lathrop, Receiver*, 12 F. R., 353, 358,
Morris v. *Lindauer*, 54 F. R., 23,
Shirk v. *City of LaFayette*, 52 F. R., 857,
Banks v. *Teaneridge*, 60 F. R., 963, 965,
Pennington v. *Smith*, 78 Fed. Rep., 399,
Reinach v. *Atlantic & G. W. R. R. Co.*, 58 F. R., 33, 37,
Popp v. *Ry. Co.*, 96 Fed. Rep., 465.

In *Railway Company* v. *Whitton's Administrator*, 13 Wall., 270, an administrator who was a citizen of Illinois, was allowed to remove an action under the act of Congress of March 2, 1867, from the state court of Wisconsin to the United States Court on the ground of diverse citizenship, it being an action to recover damages for the wrongful death of the plaintiff's intestate under the Wisconsin statute.

In *Noonan* v. *Delaware L. & W. R. Co.*, 68 F. R., 1, a citizen of New Jersey, as administrator, sued under the New Jersey statute a citizen of Pennsylvania in the Federal court in New York for wrongfully causing the death of his intestate in New Jersey, and the defendant having appeared generally the jurisdiction of the Court was sustained.

In *Harper* v. *Norfolk & W. R. R. Co.*, 36 Fed. Rep., 102, an administrator, a citizen of Tennessee, sued under the Virginia statute a citizen of Virginia in the United States Court of West Virginia for wrongfully causing the death of his intestate in Virginia. The defendant pleaded that the deceased was a citizen of the state of Virginia and left a widow and children surviving him, who were likewise citizens of the state of Virginia. The Court overruled the plea, saying (p. 103):

"It is conceded that the plaintiff, the administrator of Anderson Harper, is a citizen of the state of Tennessee, and that the defendant is a resident of the state of Virginia; but the defendant contends that Isaac Harper, the administrator of Anderson Harper, is merely a nominal party to the record; that the widow and children of Anderson Harper are the real parties in interest in this action; that the administrator is a mere instrument or conduit through whom the rights of the real plaintiffs are asserted. To sustain this position, counsel for the defendant relied chiefly on *Browne* v. *Strode*, 5 Cranch, 303; and on *McNutt* v. *Bland*, 2 How., 9."

After explaining those cases, the Court further said :

" The principle decided in these two cases is that a public officer to whom an official bond is made payable, and whose name must be employed by the plaintiff in a controversy between citizens of different states, or an alien and a citizen, can not be considered a party litigant. *McNutt* v. *Bland*, *supra*. Can it be said in the case at bar that the plaintiff, the administrator of Anderson Harper, is not a party litigant? He is in no sense a public officer. He is the actor in the controversy. The law compels him to be such. By statute the legal right to bring this action is vested in him. No other party can bring it, nor in any way be a party plaintiff to it. In *Bonnafee* v. *Williams*, 3 How., 574–577, the Court says : ' Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the Court will not enquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue at law in Federal courts, without reference to the citizenship of those who may have the equitable interest.' "

Goff's Admr. v. *N. & W. R. R. Co.*, 36 F. R., 299, 301, is to the same effect.

Popp v. *Ry. Co.*, 96 Fed. Rep., 465, is a decision on the exact question involved in this case.

It is in the light of these cases that the case of *Stewart* v. *B. & O. R. R. Co.*, 168 U. S , 445, and the cases therein cited and relied upon by plaintiff in error must be considered.

In that case, the accident, which resulted in the death of the person on account of which recovery was sought, happened in Maryland and the statute provided that such action should be for the benefit of the wife, husband, parent and child of the person whose death should have been so caused, and should be brought in the name of the state of Maryland. Rev. Code, Maryland, 1878, p. 724. " This practice," of bringing a suit in name of one to the use of another, " is familiar with the Maryland courts, and when the action originates in that form the *cestui que use* is regarded as the real party to the suit."

Gaither v. *Farmers & Merchants Bk.*, 1 Pet., 42.
Stewart v. *B. & O. R. R. Co.*, 168 U. S , 449.

The action was brought in the name of the administrator appointed in the District of Columbia " for the benefit of the persons designated in the statute of Maryland." The statute of the District of Columbia authorized no such action to be brought ex-

cept where the accident happened in that district, in which event it authorized an action *in the name of the administrator*. The result was that the action, in place of being brought in the name of the state of Maryland for the use and benefit of the beneficiaries under the Maryland statute, was brought under that statute in the District of Columbia in the name of the administrator for the use and benefit of the same parties. The statute of Maryland gave the state of Maryland, the nominal plaintiff, no control of the action, nor did it make the institution of the suit depend upon any act of the nominal plaintiff, nor even make the nominal plaintiff a trustee for whatever was recovered for the benefit of the beneficiaries. The beneficiaries could bring the action and control it when brought. It, therefore, belonged, so far as real and nominal parties were concerned, to that class of cases " where the real and only controversy was between citizens of different states or an alien and a citizen and the plaintiff is, by some positive rule of law, compelled to use the name of another to perform merely a ministerial act, who is not, or never had any interest in or control over it." *Walden* v. *Skinner*, 101 U. S., 589, and where, therefore, the courts of the United States do not consider any others as parties to the suit than the persons between whom the litigation before them really existed.

The only question, therefore, in the Stewart case was whether it was an essential prerequisite to the suit that the nominal plaintiff should be the state of Maryland for the use of the beneficiaries. It not being contrary to the public policy of the District of Columbia to recover damages for wrongful death, the Supreme Court held, in accordance with its previous decisions and those already cited that under such circumstances as the state of Maryland would have been a nominal party, the administrator, in whose name the action was brought, was also a merely nominal party, in suing under the Maryland statute for the beneficiaries therein named and that the real parties in interest in either event were the beneficiaries.

From what has been heretofore said, it is apparent that the Indiana statute is not of that character, but that it vests in the administrator, whether domestic or foreign, the absolute control and right to institute, conduct, and with the approval of the Pro-

bate Court by whom he was appointed, to compromise the litigation, and after taking out the expenses thereof, to distribute the proceeds as provided by the statute, to those to whose interest they inure. If no such distribution were made, he could be compelled, as trustee of an express trust, to make such distribution. The beneficiaries could not have maintained the action in the name of the administrator, nor could they, under the Indiana statute, have exercised any control over it. On the contrary, under the Maryland statute, the beneficiaries could have instituted the action in Maryland in the name of the state for their use, and the Supreme Court held they could do so in the District of Columbia in the name of the administrator, just as in *McNutt* v. *Bland*, a citizen of a state, other than Mississippi, was allowed to institute a suit in the name of the Governor of Mississippi, to whom the bond had been given, for his use and benefit; or, as in *Huff* v. *Hutchinson*, persons who were citizens of a different state were allowed to institute a suit on an attachment bond in the name of the former Marshal of the United States for their use and benefit; or, as in *Maryland* v. *Baldwin*, parties interested were allowed to institute in the name of the state of Maryland for their use and benefit a suit on the administrator's bond taken in the name of the state; or, as in *Browne* v. *Strode*, 5 Cranch, 303, an alien was allowed to institute an action in the name of Justices of the Peace of Virginia against citizens of Virginia, in the United States Court on a bond taken in the name of the Justices of the Peace for their benefit.

So far as the case of *Wolf, Admr.*, v. *Ry. Co.*, 55 O. S., 517, is concerned, it is to be borne in mind that the question involved in that case was as to whether or not the contributory negligence of the administrator defeated the recovery, and also to what extent the contributory negligence of any of the beneficiaries likewise defeated the recovery. In that connection alone the language relied upon is used. Unquestionably, as the administrator had no personal pecuniary interest in the recovery, his contributory negligence would not defeat the action. It was otherwise with the contributory negligence of a beneficiary, who would ultimately get the money.

In addition, the statute of Ohio directs simply that the action

should be brought *in the name of the administrator;* and, as the Court remarks, does not even say that he should bring the action, but only that it should be brought in his name. It may be an open question in view of the decision in *Dennick* v. *R. R. Co.*, 103 U. S., 11, whether the provision that the action should be brought in the name of the administrator does not also imply that the administrator should institute and control the suit and thereby be the only person to determine whether or not it should be brought.

In *Dennick's case* a similar statute of New Jersey was so construed, and even in *Wolf* v. *the Ry. Co.*, it is said, page 530:

"The administrator is only a trustee for the beneficiaries and has no interest in the case for himself or the estate he represents."

And again, on page 537:

"It is therefore clear that the statute throughout is distributive in its character and that the damage should be assessed only for the benefit of those who are not guilty of contributory negligence, and that when recovered the damages should be distributed by the Probate Court only among such as the verdict of the jury shall show to be entitled thereto. This throws no clog in the way of the prosecution of the action by the administrator, and awards damages to those who are without fault, and does not reward those who contributed to the injury."

The prior decisions of the Supreme Court of Ohio, also render it at least doubtful whether in a case where the beneficiaries should attempt to bring the action in the name of the administrator they would be allowed to do so.

Weidner v. *Rankin*, 26 O. S., 522.
Steel, Admr., v *Kurtz*, 28 O. S., 191.

However this may be, it is immaterial in view of the Indiana statute. That statute provides that when the death of one is caused by the wrongful act or omission of another, *the personal representatives of the former may maintain an action therefor against the latter* if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission.

The right of action is distinctly vested in the administrator. He is the real, not the nominal party. He can maintain it and he alone, and the statute merely continues in him a right of ac-

tion which would have vested in the decedent had the latter not died. These rights of his determine his status on the record in this case.

In view of the foregoing authorities such cases as those of *Indiana, ex rel Stanton*, v. *Glover*, 155 U. S., 513, and *Blacklock* v. *Small*, 127 U. S., 96, seem irrelevant. It will certainly not be maintained that the Court in the former case asserted that a trustee could never bring an action as trustee against one in the Federal courts if any of the *cestuis que trust* were not also citizens of some state other than that of the defendant. Such a proposition would overthrow the jurisdiction in almost every railroad foreclosure suit that has been brought in the Federal courts and overrule repeated decisions of the Supreme Court.

Dodge v. *Tulleys*, 144 U. S., 451, 455, 456.

An examination of the case of *Indiana, ex rel Stanton*, v. *Glover*, will show that the reference to the *cestui que trust* being citizens of other states than Indiana, was occasioned by the fact that, the suit was on an official bond for violation by the defendant of his duties as an officer in issuing certain certificates of indebtedness contrary to the law, of which Stanton and those he represented were the assignees and holders from one Pollard whom it did not appear could have prosecuted the suit in the Circuit Court of Indiana.

It is apparent from the case also that the certificates had been assigned to Stanton for the purpose of bringing the suit in question.

The following quotation from *Blacklock* v. *Small*, 127 U. S., 96, will dispose of any supposed bearing that that case has on this controversy (page 104):

"The bond was a unit; the mortgage was a unit; and the assignment of the bond by Blacklock to Robertson in trust for the children of Blacklock was a unit. The bond can not be enforced against Small, nor can the mortgaged premises be sold in favor of the two plaintiffs alone. The relief asked in the suit must necessarily be for the defendant, Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, she ranges herself on the side of the plaintiffs against Small, joins in the prayer of the bill and asks that the payment of the bond and the satisfaction of the mortgage be delared void,

and that the bond and mortgage be declared valid in the hands of Robertson, as trustee, for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest."

Where the jurisdiction depends upon the citizenship of the parties the Court will always range the parties on one or the other side of the record as plaintiffs or defendants according to their real interest in the subject matter of the controversy and not their apparent position as parties plaintiff and defendant. Naturally the citizenship of the next friend is not the test of jurisdiction in the Federal courts, since he is not even a party to the action.

Blumenthal et al v. *Craig*, 81 F. R., 320.

IV.

The Court did not Err in Excluding Testimony.

The fifth and sixth assignments of errors may be considered together and are as follows:

5. That the Court erred in refusing to permit the defendant to put the following question to witness: "Where were those personal effects that you spoke of at the time you made your application?"

6. That the Court erred in ruling out and excluding the testimony offered by the defendant to show that the plaintiff's administration was not based upon any personal estate in Fayette county, Indiana, other than the claim sued on.

An examination of the record will show that the Court was right in rejecting this evidence as it was not material or relevant to any issue in the case and for the reason that the only ground upon which defendant offered it and excepted to its exclusion was not tenable.

The record (pp. 10 and 11) shows that after the defendant's witness had stated that in the application for appointment of administrator it was represented to the Circuit Court of Fayette

County, Indiana, that deceased had left an estate of about one hundred dollars in value *in that county* to be administered, consisting of a gold watch and other personal property left by him *in the county* at the time of his death, and that such articles "were there" at the time of the application and appointment, the Court thereupon said:

"I don't see how you can attack that appointment."

Mr. Ramsey said:

"*I am not attacking that appointment.* I simply want to have the case fully presented on the question of jurisdiction. I want to make it appear that the claim he is now suing for is on behalf of the next of kin and that is the whole estate. I don't know that it is necessary, but I should like to have the record so show so that the question can be settled once for all as to the jurisdiction of the Court."

Mr. Cleveland, of counsel for plaintiff, then said:

"I don't think you can make a collateral attack."

The Court said:

"He wants to show that there was no other estate except this claim. I suppose he wants to raise the question that where an administrator is appointed merely for the bringing of suit that the jurisdiction can not be sustained. You can not attack that record."

Mr. Ramsey then put the following question to the witness:

"Q. Where were those personal effects that you spoke of at the time you made your application?"

Counsel for plaintiff objected to this question.

The Court then said:

"I don't think it is competent because that can not be used for any other purpose than to attack this record. The record is conclusive on that in this case. You can prove the fact, if it be a fact that there was no other estate than that which is claimed."

Mr. Ramsey:

"*I don't want to attack the record*, but I want to show that there was no other estate."

The Court:

"You are asking what there was in Fayette county, that I rule out." To which ruling of the Court counsel for defendant then and there excepted.

The question was put in support of the proposition already discussed (III.) that the Circuit Court was without jurisdiction.

The theory upon which defendant offered the testimony was that if there was no property of intestate in Fayette county at the time the administrator's appointment was made, except the claim for wrongful death, then the administrator in asserting such a claim was acting solely on behalf of the beneficiaries under the statute, was therefore a mere nominal party, and that the beneficiaries, citizens of the same state as the defendant, being the real parties in interest, the Federal Court was without jurisdiction, the requisite diversity of citizenship not appearing.

It is evident, however, that the question whether the administrator is a nominal or real party in an action for wrongful death does not in any manner depend upon, and is not aided by showing whether or not he had other assets of the intestate upon which to administer. The evidence was offered by defendant under an erroneous impression that, where there were no other assets, an administrator in an action to recover for wrongful death would be a nominal party, while if there were other assets he would be a real party to such action. Of course no such distinction exists in law, and therefore the question whether there were or not other assets in Fayette county than the claim for wrongful death was directed to an immaterial and irrelevant state of facts. The answer could have no legal significance or bearing upon any issue of fact or law in the case upon which defendant asked that it be admitted or upon which the defendant urged his objection to the exclusion of the testimony.

V.

The Administrator's Appointment.

The eighth assignment of error is as follows:

"That the administrator's appointment is void and that the Court erred in holding that such appointment could not be collaterally attacked and in excluding evidence tending to show that the appointment was void."

This claim ought not to be considered. It is an effort to here raise a question that was not presented or discussed at the

trial. It is an attempt to criticise the Court for excluding testimony that was not offered for any such purpose as counsel here claim it would have served, and to here assert the relevancy of such testimony on a ground not indicated, and in fact *expressly disclaimed* at the trial.

In objecting to the exclusion of this testimony, the overruling of which is here assigned for error, counsel at the trial not only failed to state any such ground or reason for its admission as is now attempted to be asserted here, viz., that such evidence would tend to show the invalidity of the administrator's appointment, but on the contrary, specifically disclaimed offering such evidence on any such ground or for any such purpose.

It will be seen by reference to the record quoted above that the question which was presented to the Court and which the Court ruled on was that the testimony which counsel desired to bring out for the purpose of showing the want of jurisdiction of the Federal court was not relevant for that purpose and could only be used to attack the validity of the administrator's appointment, for which purpose counsel disclaimed offering it. Therefore the Court ruled it out. No claim of error can here be predicated on a ground not urged but disclaimed at the trial. No tender was made of any testimony for any such purpose, and the trial Court excluded the testimony with that understanding and on the express statement of counsel that the competency of the testimony was urged only on the ground of its relevancy as showing that, there being no estate other than the claim for wrongful death, the citizenship of the beneficiaries, rather than that of the administrator, determined the jurisdiction of the Federal court, and not on the ground that the testimony would tend to show that the administrator's appointment was void.

At the trial the objection of defendant to the ruling of the Court excluding such testimony did not state any such ground for the objection, and it is well settled that to make avail of any such exception the record must show that the ground therefor was specifically stated at trial. In the case of *Ky. Co.* v. *Hellenthal*, 88 Fed. Rep., p. 119, the Court say:

"It has been decided again and again that an objection to evidence which does not specifically and distinctly indicate the

grounds upon which it is made is of no avail on writ of error. Citing *Mitchell* v. *Marker*, 22 U. S. App., 325; *Toplitz* v. *Hedden*, 146 U. S., 252; *U. S.* v. *Shapleigh*, 54 Fed., 126."

The rule applies obviously whether the objection is to the admission or exclusion of evidence. If to its exclusion, the ground for its admissibility should be specifically and distinctly indicated, or such ground not being brought to the attention of the trial Court will be deemed waived or at least will be of no avail on writ of error.

The rule is also stated in *Noonan* v. *Mining Co.*, 121 U. S., 400.

"The objection to the introduction of the articles of incorporation *at the trial* was that they were 'immaterial, irrelevant and incompetent' evidence. The specific objection now urged that they were not sufficiently authenticated to be admitted in evidence and that the certificates were made by deputy officers is one which the general objection does not include.

". . . . The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal."

In *R. R. Co.* v. *O'Reilly*, 138 U. S., 334, the Court say:

"It is perfectly well settled in this Court that where a case has gone to a hearing, testimony being admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered with judgment on the verdict, the losing party *can not, in the appellate Court, state for the first time a reason for that objection which would make it good. Roberts* v. *Graham*, 6 Wall, 578; *Patrick* v. *Graham*, 132 U. S., 637."

See also: *Lithographing Co.* v. *Falk*, 20 U. S. App., 296.
Supreme Council v. *Fidelity Co.*, 22 U. S. App., 458.
Case v. *Hall*, 94 Fed., 300.

A fortiori must it be true that where the objection is not general, but is specific, and states a single ground for objection, another ground not specifically stated, but disclaimed at the trial, as in the case at bar, will not avail on proceedings in error.

In *Patrick* v. *Graham*, 132 U. S., 627, the Court say:

"The record before us does not show that the defendants, at the time of the trial and at the introduction of the evidence, gave any reason at all why it should be rejected; much less the reason which they now insist on. It can not be permitted that after a

case has gone to a hearing, testimony submitted to the jury, and a verdict rendered, a party for the first time shall state a reason for his objection to that evidence which would make the objection good."

Here there is an attempt by a party to state a reason for his objection to the exclusion of his testimony after the case has gone to hearing, testimony submitted to the jury, and a verdict rendered, which reason he states here for the first time, and in the teeth of his disclaimer at the trial.

In *Central Vermont Co.* v. *Ruggles*, 75 Fed., 955, the Court say :

"Referring again to the form of the objections to the admission of this testimony as stated in the record, it illustrates the propriety of the rule in the Federal courts to the effect that parties desiring to reserve exceptions in connection with such objections should state specifically and clearly the grounds thereof. In this case, if the defendant below had so stated its objections as to have brought to the attention of the Court the proper issue, this evidence would have clearly appeared incompetent and would probably have been ruled out. Apparently the defendant below *acquiesced in the presentation of the issues to the jury as they were in fact presented*, because, as we have seen, no specific objection was taken on that score. . . . . It is not for us to frame the issues to be tried in the Court below. The parties may ordinarily frame them as they see fit."

And on page 959 :

"It seems, therefore, that the only proposition of law which could have required the elimination of any of this testimony was not brought to the attention of the Court below by the objections and exceptions, and therefore, this alleged error can not receive consideration."

In the case of *St. Louis S. W. Ry.* v. *Henson*, 58 Fed., 531, it was held :

"1. In an action by a husband for the alleged negligent killing of his wife, an objection that the plaintiff has no legal capacity to sue will not be considered on appeal, where the objection is then made for the first time."

The Court say, page 532 :

"It is said in the brief of the learned counsel for the plaintiff in error that the plaintiff 'had no legal right or capacity to institute this suit in his own name. Consequently, having no le-

gal capacity to sue, the objection to the testimony of each of the witnesses offered at the proper time by the plaintiff in error should have been sustained, and no such evidence was legal under the complaint.' But no such objection to the admission of the testimony was made in the lower Court. The objection that the plaintiff can not maintain an action in his own name for the negligent killing of his wife is made for the first time in this Court. It might have been raised in the lower Court by a demurrer to the complaint, or by an objection to the introduction of the testimony, or by request for an instruction, but it was not raised in any of these modes and was not raised at all. The plaintiff in error proffered eight requests for instructions, not one of which questioned, and every one of which by implication conceded, the right of the husband to bring the suit, and rested the defense to the action on other grounds. It is the province of an appellate Court to review the rulings of a trial Court on questions actually brought to the attention of that Court and decided by it. An objection to the introduction of testimony which states no ground for the objection deserves no consideration in the trial Court and will receive none in this Court. And a party can not urge one ground in the trial Court and another on appeal. These rules are essential to preserve the character of this Court as a Court of review. Elliott, App. Proc., Secs. 770, 771. An appellate Court can consider only such matters as are properly of record, and a matter not appearing of record has no existence as a predicate for error. When the record does not affirmatively show error duly excepted to in the lower Court, and duly assigned for error there, the presumption obtains that no error was committed. As the right of the plaintiff to maintain this suit in his own name was not questioned, so far as the record shows, on the trial of the cause in the lower Court, and was not there assigned for error, this Court can not consider it."

In *Board of Com'rs* v. *Sutliff*, 97 Fed. Rep., 275, the Court say:

"This question was never presented to the trial Court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, and no error was ever assigned, to any ruling upon it. It is therefore not here for our consideration. In an action at law, this is a Court for the correction of the errors of the Court below exclusively. Questions which were not presented to, or decided by that Court, are not open for review here, because the trial Court can not be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. *Railway Co.* v. *Henson*, 19 U. S., App., 169, 171; *Philip Schneider Brewing Co.* v. *American Ice Mach. Co.*, 40 U. S., App., 382, 403; *Manufacturing Co.* v. *Joyce*, 8 U. S., App., 309, 311. If it should be thought that the exception to the per-

emptory charge of the Court to return a verdict for the defendant, and the assignment of error upon that ruling presented this question, attention is called to the fact that this exception and assignment present nothing for review in this case, because the bill of exceptions contains only fragmentary portions of the evidence. It is impossible for an appellate Court to determine whether or not the Court below came to the true conclusion when it directed a verdict upon the evidence in the case, unless all the evidence before that Court is presented to the reviewing Court for its consideration."

Such objection now here made for the first time injects into the case an issue not only not dealt with by the Court below, but never raised in the pleadings before the Court below.

The petition alleges that the plaintiff was duly appointed and qualified administrator, etc. (Rec., pp. 1 and 2). The answer was a general denial merely and did not put in issue the capacity of the plaintiff to sue or his right to bring the action.

It is well settled that there must be something in the nature of a special plea setting up the want of power of the administrator to sue or alleging the invalidity of his appointment.

This is true whether the findings are governed by the code practice of Ohio or by the general principles recognized by the Federal courts.

Such an issue is not tendered by a general denial, and even if counsel had placed his exception to the exclusion of the testimony upon that ground the Court would have been justified in refusing to permit the defendant to put in any proof of want of assets, situated in the county, which would be in the nature of an attack upon an appointment, the validity of which was admitted by defendant's answer to the merits without specific denial of plaintiff's representative character and capacity to maintain the action. Rev. Stat. O., 5062 and 5064.

The Ohio code requires the objection of plaintiff's want of capacity to sue, when apparent upon the face of the petition, to be taken by demurrer "specifying the ground of objection," and if not apparent upon the face of the petition, then "the objection shall be taken by answer, and if not taken by answer or demurrer, the defendant shall be deemed to have waived the objection."

"Sec. 5062. The defendant may demur to the petition only when it appears on its face either:

"1. That the Court has no jurisdiction of the person of the defendant or the subject of the action.

"2. *That the plaintiff has not legal capacity to sue.*

"3. That there is another action pending between the same parties for the same cause.

"4 That there is a misjoinder of parties plaintiff.

"5. That there is a defect of parties, plaintiff or defendant.

"6. That several causes of action are improperly joined.

"7. That separate causes of action against several defendants are improperly joined.

"8. That the petition does not state facts sufficient to constitute a cause of action."

"Sec. 5062. The demurrer shall *specify the grounds of objection* to the petition, and unless it does so it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action, or that the Court has no jurisdiction of the subject matter."

"Sec. 5063. When any of the defects enumerated in section five thousand and sixty-two do not appear upon the face of the petition, *the objection* may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court, and that the petition does not state facts sufficient to constitute a cause of action."

In *Ewen, administrator*, v. *Ry. Co.*, 38 Wis., 637, the Court say:

"The general denial under the code has no broader application than the general issue under the old system of pleading, and all the authorities agree that the representative character of the plaintiff was not put in issue by a plea of the general issue . . . . It is very evident that under this rule the representative character of the plaintiff would be put in issue only by a special denial of that fact in the answer, and that under the general denial the defendant did not contradict it."

To the same effect are:

White, executor, v. *Moses*, 11 Cal., 70.
Cheatham, v. *Riddle, executor*, 12 Tex., 112.
Clifton v. *Lilley*, 12 Tex., 130.
Dillaye v. *Parks*, 31 Barb., 132.
Elektron Co. v. *Jones Bros. Co.*, 8 Circuit Ct. Ohio, 311.
L. & N. R. R. Co. v. *Trammel, Adm'r*, 93 Ala., 350.
Cheek v. *Wheatley*, 11 Humph., 556.
Kowanachi v. *Askew*, 17 Ark., 595.

Perkins v. *Stimmel*, 114 N. Y., 369.
Nanz v. *Oakley*, 122 N. Y., 631.
Mosselman v. *Caen*, 34 Barb., 66.
Bulkeley v. *Iron Co.*, 77 Mo., 105, 107.
Sanford v. *McCreedy*, 28 Wisc., 106.
Meyer v. *Lane*, 40 Kan., 493.
Ins. Co. v. *Robinson*, 8 Neb., 452.
Schuek v. *Hagar*, 24 Minn., 339.

In the case of *Noonan* v. *Bradley*, 9 Wall., 394, the question is discussed and the conclusion reached that "a plea to the merits admits the representative character of plaintiff to the extent stated in the declaration, (Syllabus 5)," and that a special plea either in abatement or bar is necessary in order that the question may be raised.

See also:

Childress v. *Emory*, 8 Wheaton, 642.
Kane v. *Paul*, 15 Peters, 33.
Hodges v. *Kimball*, 91 Fed., 845.
Pullman v. *Upton*, 96 U. S., 328.

In the case of *Society* v. *Pauclet*, 4 Peters, 480, at page 501, the Court held, speaking by Mr. Justice Story:

"If the defendants meant to insist on the want of capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this Court to be an admission of the capacity of plaintiffs to sue; the general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring."

And as a matter of law the Court was right in holding that the judgment of the Circuit Court of Fayette County could not be collaterally attacked. The Circuit Court of Fayette County, Indiana, is a Court of general jurisdiction,

Revised Statutes Indiana, Sec. 1366 (Burns Ed.)
Barkley v. *Tapp*, 87 Ind., 25,

and have exclusive probate jurisdiction.

Heaton v. *Knowlton*, 65 Ind., 255.
Hallenberg v. *Bennett*, 88 Ind., 540.

The evidence tended to show that deceased left assets in Fayette county of the value of $100, and that such assets "were

there," *i. e.*, in Fayette county, at the time the application was made (Rec., p. 8).

The record does not contain the petition or application upon which the plaintiff was appointed administrator. There is a blank with the letters "H. I." (Rec., p. 12), which we assume stand for "here insert," where the petition should appear. We are entitled to the benefit of the presumption that a complete record would have shown the proper jurisdictional allegation, especially as defendant interposed no objection.

The record does show that the petition did contain allegations showing that the deceased had "died intestate in Fayette county, leaving assets" of the value of $100. The fair construction of this language is that such assets were left in Fayette county and the proof offered by defendant itself at the trial showed that such was the fact; that such assets were left "*in that county*" (Rec., p. 9), at the time of his death and "*were there*" at the time the application was filed.

The judgment of the Fayette Circuit Court on this fact, termed in *Reinach* v. *Ry. Co.*, 58 Fed. Rep., p. 43, a "*quasi* jurisdictional fact," is binding in collateral proceedings.

The same is held in:

Garrett v. *Boeing*, 68 Fed., 51.
Lloyd v. *Walker*, 74 Fed., 606.
Noble v. *Logging Co.*, 147 U. S., 165.
Simmons v. *Saul*, 138 U. S., 439.
McNitt v. *Turner*, 16 Wall., 352.
Mohr v. *Maniere*, 101 U. S., 424–5.
Caujolle v. *Ferrie*, 13 Wall., 465.

In *Comstock* v. *Crawford*, 3 Wall., 396, the Court say, at page 403:

"Whether there was a widow or next of kin or creditor, were matters for the Court, and its determination can not be collaterally impeached."

In *Holmes, Admr.*, v. *Oregon Ry. Co.*, 9 Fed., 229, will be found a very full discussion of the question and a review of authorities. In that case the Court held that the decision of the state Court on the question of inhabitancy of decedent to give jurisdiction for the appointment of an administrator was not open

to examination in a subsequent proceeding in a Federal Court.

In *M'Gehee* v. *M'Carley*, 91 Fed. Rep., 462, the Circuit Court of Appeals for the Fifth Circuit held as follows:

"The validity of the appointment of an administrator, made by a court of general probate jurisdiction, can not be questioned collaterally in an action brought by such administrator to recover for the tortious killing of his decedent, it not appearing but that a judgment in the action would render the matters involved *res judicata*."

VI.

A Foreign Administrator May Sue in Ohio.

The ninth assignment of error is that the plaintiff, as an Indiana administrator, can not maintain this action in Ohio.

There is, of course, no doubt that in the absence of an enabling act, a foreign administrator would have no right to maintain this or any other action in the Courts of Ohio.

But where a statute does give the right to a foreign administrator to sue it is equally well settled that he may maintain the action. *Cheney* v. *Stone*, 29 Fed., 885; *Hayes* v. *Pratt*, 147 U. S., 557.

The Statutes of Ohio give a foreign administrator the right to maintain in the Courts of Ohio an action for wrongful death of his intestate.

The first is the statute, Sec. 6133, Revised Statutes of Ohio, which reads as follows:

"Sec. 6133. An executor or administrator duly appointed in any other state or country may commence and prosecute any action or proceeding, in any Court in this state, in his capacity of executor or administrator, in like manner and under like restriction as a non-resident may be permitted to sue."

There is no authority whatever for counsel's attempt to read into this statute an exception forbidding the administrator to maintain an action for wrongful death, and counsel cites no case where a statute couched in language as broad as is here used, has been given any such construction as he contends for.

A right of action for wrongful death occurring in another state is recognized by the Statutes of Ohio, as follows:

"Sec. 6134 *a*. Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its Courts of the statute of this state of a like character, etc."

The law of Indiana does permit such right of action given by the Ohio Statute to be enforced in Indiana.

Ry. Co. v. *McMullen, Admr.*, 117 Ind., 439.
Burns, Admr., v. *Ry. Co.*, 113 Ind., 167.

The next succeeding section recognizes by implication that the personal representative bringing such an action for the wrongful death occurring in another state may not have been appointed in Ohio. The section reads as follows:

"Sec. 6135. . . . . Such personal representative, *if he was appointed in this state*, with the consent of the Court making such appointment, may at any time, before or after the commencement of a suit, settle with the defendant the amount to be paid, etc."

In the case cited by counsel, that of *Maysville Ry. Co.* v. *Marvin*, 59 Fed., 91, nothing adverse to our contention is decided.

In that case the Court held that a foreign administrator derived no power to maintain an action for wrongful death in the courts of Kentucky from the statute of Kentucky which empowered a foreign administrator to "prosecute actions for the recovery of debts due to such decedents." That an action for wrongful death was not an action for the recovery of a debt nor was the liability therefor a "debt due decedent," that the right of action had no existence during the lifetime of the decedent.

The plain inference from this case is that if the statute of Kentucky, like that of Ohio, had empowered the foreign administrator to "commence and prosecute any action or proceeding in any court in the state in his capacity of executor or administrator," the suit for wrongful death could have been maintained.

Counsel urges that this section does not relate to suits brought by an administrator as a nominal party, but the statute

does not contain any such limitation, and the administrator is *not* a nominal party in enforcing the Indiana statute, authorizing him to bring an action for wrongful death of his intestate. This statute has been so construed by the Supreme Court of Indiana, which interpretation is binding here, in the case of *Yelton's Admr.* v. *Ry. Co.*, 134 Ind., 414, in which case it was held that the administrator is a not a nominal, but a real party to the action, has the sole power to control it, and in his capacity of executor or administrator bears to the fund recovered the relation of "trustee of an express trust."

The precise question was passed upon in the case of *Popp, Admr.*, v. *Ry. Co.*, 96 Fed., 465, the Court holding:

"This cause is submitted to the Court upon a demurrer to the petition upon the ground that it does not appear therefrom that the Court has jurisdiction of the action.

"It is said that, for aught that appears in the petition, the plaintiff may have been appointed administratrix in a foreign country, or in some state of the Union other than Ohio, and that under Section 6133 of the Revised Statutes of Ohio, a foreign administrator can not maintain an action 'for death by wrongful act' under Sections 6134, 6134*a* and 6135 of said statutes. This claim is based upon a construction of Section 6133, which would exclude actions for wrongful death as not being brought by the foreign executor or administrator 'in his capacity of executor or administrator,' because any damages recovered in such action would not become assets of the estate, but would be apportioned among the wife, husband, children or next of kin of the deceased. I do not think this construction sound. I think the manifest intention of the Legislature was to allow foreign executors and administrators to prosecute any action which might be prosecuted by an executor or administrator appointed in this state, 'in like manner and under like restrictions as a non-resident may be permitted to sue.'" *Duchesse D'Auxy* v. *Porter*, 41 Fed., 68; *Noonan* v. *Bradley*, 9 Wall., 394, 403.

It should also be noted that the record shows no objection taken in the Circuit Court either by demurrer or other pleading, or by objection to the introduction of evidence nor in any other way that the question was brought to the attention of or ruled on by the Circuit Court, and we submit on the principles stated and authorities cited on page — of this brief that it is now too late to raise the question in the appellate court, for the first time in the case, whether the foreign administrator had the right to bring the

action. Defendant acquiesced without question in plaintiff's assertion of such right, and can not assign for error that the trial Court did not, *sua sponte*, raise and enforce the objection. *Non constat*, if the question had been seasonably raised it might not have been within the power of plaintiff to have shown an appointment as Ohio administrator also.

In fact the eighth and ninth assignments of error ought not to be treated or considered as such. They are not assignments of error in any proper sense, they are merely *claims* made here in the appellate court without being predicated upon or purporting to relate to any error committed by the trial Court against any objection or over any exception of defendant. No such claims were suggested or presented at the trial, nor was there any ruling thereon by the Court against defendant based upon such claims.

While, therefore, we have endeavored to show that the claims are without merit, yet we insist that in any event the points were not so saved as to properly come before the Court on review of the proceedings below.

We submit, therefore, motion to affirm should be granted.

Respectfully submitted,

CHARLES M. CIST,
HARLAN CLEVELAND,
Counsel for Defendants in Error.

EDGAR W. CIST,
Of Counsel.

APPENDIX.

STATUTE OF INDIANA.

An Act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state. *Provided further*, That its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Laws of Indiana, 1893, p. 294, Revised Statutes of Indiana, 1894 (Burns), Sections 7083-7087). [Approved March 4, 1893].

[7083] 1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by an employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular

instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

[7084] 2. (*Repealed March 7, 1895.* Acts Indiana 1895, p. 148).

[7085] 3. The damages recoverable under this act shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions: *Provided*, That where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

[7086] 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state.

[7087] 5. All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employe having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

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CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *v.* THIEBAUD.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 259. Argued April 24, 1900. — Decided May 14, 1900.

SAME *v.* SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 271. Submitted April 24, 1900. — Decided May 14, 1900.

A record showing an instruction by the Circuit Court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, does not disclose a case in which it is claimed that the law of a State is in contravention of the Constitution of the United States, within the meaning of section 5, of the act of March 3, 1891, where the record of the Circuit Court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the Circuit Court.

The act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits in the same case and at the same time to or from two appellate courts, and the record in No. 271 falls within this rule.

THE certificate in No. 259 reads as follows:

"This was an action brought by Benj. F. Thiebaud, a citizen of Indiana, as administrator of Chris. Sweetman, deceased, appointed by the Circuit Court of Fayette County, Indiana, against the C., H. and D. R. R. Co., a corporation and citizen of Ohio, to recover damages for the wrongful death of said Chris. Sweetman, who, while employed as a locomotive engineer by said company, on an engine drawing its pay car, was, without

fault on his part, killed in a collision between his engine and that of a freight train. The collision was caused by the negligence of the conductor and engineer of the freight train. The court charged the jury, among other things, that inasmuch as the deceased had been killed through the negligence of fellow-servants, the defendant would probably not be liable at common law, but that it was liable for the negligence charged and admitted under the act of the general assembly of Indiana, approved March 4, 1893, entitled 'An act regulating the liability of railroad and other corporations, except municipal, for personal injuries to persons employed by them,' etc. Laws of Indiana, 1893, p. 294; Rev. Stat. Ind. secs. 7083–7087. Upon which act the plaintiff relied for recovery; to which charge the defendant excepted.

"The record does not show upon what ground said exception was taken and does not show that said exception was upon the ground that the statute contravenes the Constitution of the United States, or that the constitutionality of the statute was otherwise raised or considered or decided by the Circuit Court. The statute is not mentioned in any of the pleadings. The rec ord shows other exceptions taken, duly assigned for error, which do not raise any constitutional question, and which may require the reversal of the judgment of the Circuit Court without reference to any constitutional question.

"The jury rendered a verdict in favor of the plaintiff, and judgment was entered thereon.

"Thereafter the defendant brought the case, by writ of error, to this court, and assigned for error:

"1. That the court erred in charging the jury that the defendant was liable under the act of the general assembly of Indiana, approved March 4, 1893.

"2. That said act is in contravention of the Fourteenth Amendment of the Constitution of the United States.

"3. That said act is in contravention of the constitution of the State of Indiana and especially of article 11, section 23, of article 4, sections 19 and 23 thereof.

"4. That the court erred in overruling the defendant's motion to dismiss the action for want of jurisdiction.

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"5. That the court erred in refusing to permit the defendant to put the following question to the witness, Charles M. Cist: 'Where were those personal effects at the time you made your application?'

"6. That the court erred in ruling out and excluding the testimony offered by the defendant to show that plaintiff's administration was not based upon any personal estate in Fayette County, Indiana, other than the claim sued on.

"Thereupon the defendant in error moved in this court to dismiss the case for want of jurisdiction, on the ground that it is a case in which it is claimed that the statute of a State is in contravention of the Constitution of the United States, and that, therefore, under section 5 of the act of Congress approved March 3, 1891, (26 Stat. 826,) the writ of error should be taken from the Supreme Court of the United States and not from this court.

"The court is in doubt whether the case is within the provisions of said section of the act of Congress, and, therefore, upon the foregoing statement of facts it is ordered that the following questions be certified to the Supreme Court of the United States for its instructions:

"1. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States?

"2. Has the Circuit Court of Appeals jurisdiction of a writ of error to the Circuit Court in a case in which it is claimed that a law of a State is in contravention of the Constitution of the United States, where the record presents other questions not involving the Constitution of the United States, which might require a reversal of the judgment without reference to such constitutional question?

"3. Does a record showing an instruction by the Circuit Court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the

law of a State is in contravention of the Constitution of the United States, within the meaning of section 5 of the act of March 3, 1891, where the record of the Circuit Court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the Constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the Circuit Court?

"4. If it be considered that such record in the Circuit Court does not disclose a case in which a law of a State is claimed to be in contravention of the Constitution of the United States, but such claim is made, so far as the record shows, for the first time in the Circuit Court of Appeals by assignment of error, and is insisted upon at the bar, has the Circuit Court of Appeals jurisdiction in error to hear and determine the constitutional question raised by such claim?"

No. 271 is a writ of error to the Circuit Court of the United States for the Southern District of Ohio to review the judgment referred to in the certificate. In the petition for the writ, defendant set forth that "having duly prosecuted the writ of error heretofore allowed by the court to the United States Circuit Court of Appeals for the Sixth Circuit, the plaintiff in this case, being the defendant in error, filed a motion in said Circuit Court of Appeals to dismiss said writ of error upon the ground that the same should have been taken to the Supreme Court of the United States instead of to the United States Circuit Court of Appeals, and that said Circuit Court of Appeals was therefore without jurisdiction upon said writ of error. Said Circuit Court of Appeals, being in doubt whether it has jurisdiction, has certified certain questions to the Supreme Court of the United States. In view of said proceedings, the defendant, being now in doubt as to whether said writ of error to the United States Circuit Court of Appeals was properly allowed, but without prejudice to said proceeding in error, if it shall hereafter be determined that the same was properly taken, and that the Circuit Court of Appeals has jurisdiction thereof, now prays for a writ

of error to the Supreme Court of the United States, and assigns for error:" [Here followed the assignment of errors.]

Thereupon the Circuit Court entered this order:

"This cause came on to be heard upon the defendant's petition for the allowance of a writ of error to the Supreme Court of the United States; on consideration whereof, and it being known to the court that the facts stated in said petition with reference to the writ of error formerly allowed to the Circuit Court of the United States for the Sixth Circuit are true, and it being doubtful whether a writ of error should be taken to the Supreme Court of the United States or to the United States Circuit Court of Appeals, said petition is now granted and a writ of error, as prayed, is allowed to the Supreme Court of the United States."

The cases came on to be heard and were argued and submitted together.

Mr. Lawrence Maxwell, Jr., for plaintiff in error in Nos. 259 and 271.

Mr. Harlan Cleveland and *Mr. Charles M. Cist* for defendant in error in No. 259. *Mr. Edgar W. Cist* was on their brief.

Mr. Harlan Cleveland, *Mr. Charles M. Cist* and *Mr. Edgar W. Cist* for defendant in error in No. 271.

Mr. Chief Justice Fuller delivered the opinion of the court.

When our jurisdiction is invoked under section 5 of the judiciary act of March 3, 1891, c. 517, on the ground that the case falls within the fourth, fifth or sixth of the classes of cases therein enumerated, it must appear that a title, right, privilege or immunity was claimed under the Constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the constitution or law of a State was distinctly claimed to be

in contravention of the Constitution of the United States; and it is not sufficient that the point is raised in the assignment of errors. *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430; *Miller* v. *Cornwall Railroad*, 168 U. S. 131.

The certificate shows that no question as to the constitutionality of the statute of Indiana, relied on by the plaintiff below, was raised or considered or decided in the Circuit Court, but that the objection made its appearance for the first time in the assignment of errors in the Circuit Court of Appeals.

In *Carter* v. *Roberts*, *ante*, p. 496, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Courts of Appeals, those courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the Circuit Court of Appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891. *Robinson* v. *Caldwell*, 165 U. S. 359; *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68; *United States* v. *Jahn*, 155 U. S. 109; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Benjamin* v. *New Orleans*, 169 U. S. 161.

The third question propounded in the certificate must be answered in the negative, and we do not deem it necessary to answer the others.

The writ of error in No. 271 was brought while the case was pending in the Circuit Court of Appeals on writ of error from that court. The whole case was open on each writ for review on the merits.

In *Columbus Construction Company* v. *Crane Company*, 174 U. S. 600, it was laid down that the act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to or from two appellate courts; and as the record disclosed in that case that two writs of error to the judgment of the Circuit Court

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were pending, one in the Circuit Court of Appeals and the other and subsequent writ in this court, the latter was dismissed. The writ of error in No. 271 falls within this rule.

The third question propounded in No. 259 *is answered in the negative.*

The writ of error in No. 271 *is dismissed.*

MR. JUSTICE HARLAN and MR. JUSTICE WHITE were not present at the argument and took no part in the decision.